No. 85-6756

# In the Supreme Court of the United States

OCTOBER TERM, 1986

JAMES ERNEST HITCHCOCK, PETITIONER

*v.*

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## JOINT APPENDIX

RICHARD L. JORANDBY
Public Defender

CRAIG S. BARNARD *
Chief Assistant Public Defender

RICHARD H. BURR III
Assistant Public Defender

224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

*Counsel for Petitioner*

JIM SMITH
Attorney General

RICHARD W. PROSPECT
Assistant Attorney General

SEAN DALY *
Assistant Attorney General

125 N. Ridgewood Ave./4th Floor
Daytona Beach, Florida 32014
(904) 252-1067

*Counsel for Respondent*

* Counsel of Record

PETITION FOR CERTIORARI FILED APRIL 18, 1986
CERTIORARI GRANTED JUNE 9, 1986

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## RELEVANT DOCKET ENTRIES

| DATE | PROCEEDINGS |
|---|---|
| May 13, 1983 | FILED: Petition for Writ of Habeas Corpus |
| May 13, 1983 | FILED: Application for Stay of Execution |
| May 13, 1983 | FILED: Motion for Continuance pending exhaustion of state remedies |
| May 17, 1983 | ORDER: Granting Stay of Execution |
| May 31, 1983 | FILED: Response, Motion to Dismiss, and Motion to Compel, and Memorandum of Law In Support Thereof |
| June 3, 1983 | FILED: Motion for Leave to Amend Petition for Writ of Habeas Corpus |
| June 3, 1983 | FILED: Motion for Payment of Expenses and Leave to Take Discovery |
| June 3, 1983 | FILED: Motion for Evidentiary Hearing together with supporting memorandum of law |
| June 9, 1983 | ORDER: Granting Leave to Amend Petition for Writ of Habeas Corpus |
| June 9, 1983 | FILED: Amended Petition for Writ of Habeas Corpus |
| June 10, 1983 | FILED: Petitioner's Reply to Motion to Dismiss |
| June 17, 1983 | HEARING: On Respondent's Motion to Dismiss, Petitioner's Motion for Payment of Expenses of Witnesses, Fees, etc. and Motion for Leave to Take Discovery |
| June 17, 1983 | RULING: Motion to Dismiss is taken under ADVISEMENT |

| DATE | PROCEEDINGS |
|---|---|
| June 17, 1983 | RULING: Petitioner's Motion for Evidentiary Hearing is GRANTED |
| June 17, 1983 | RULING: Motion to Take Discovery and for Expenses—RESERVES RULING, directing petitioner to provide legal authority and proffers of testimony |
| June 22, 1983 | ORDER: Petitioner's Request for discovery is DENIED as to taking depositions of members of the Florida Supreme Court; and as to other requests for discovery and fees petitioner is directed to furnish proffer and estimated costs |
| July 8, 1983 | FILED: Petitioner's Supplemental Appendix in support of paragraph 19 G(2) of petition for writ of habeas corpus and Motion for Payment of Expenses, Discovery, etc. |
| September 22, 1983 | ORDER: Dismissing Amended Petition for Writ of Habeas Corpus; together with Memorandum of Decision |
| October 3, 1983 | FILED: Notice of Appeal |
| October 3, 1983 | ORDER: Application for Certificate of Probable Cause GRANTED |
| February 10, 1984 | FILED: Brief for Petitioner-Appellant |
| March 9, 1984 | FILED: Brief for Respondent-Appellee |
| March 26, 1984 | ORAL ARGUMENT |
| October 18, 1984 | OPINION: Affirming the denial of habeas corpus relief |
| November 7, 1984 | FILED: Suggestion for Rehearing En Banc |
| January 8, 1985 | ORDER: Granting Rehearing En Banc |



| DATE | PROCEEDINGS |
|---|---|
| February 7, 1985 | FILED: Supplemental Brief for Petitioner-Appellant |
| March 6, 1985 | FILED: Supplemental Brief for Respondent-Appellee |
| March 19, 1985 | FILED: Petitioner-Appellant's Motion to Strike Appendix to Appellee's Brief and Portions of the Brief Referring Thereto |
| May 9, 1985 | ORDER: Granting Motion to Strike Appendix to Brief of Appellee |
| June 10, 1985 | ORAL ARGUMENT: En Banc |
| August 28, 1985 | OPINION of the En Banc Court affirming the denial of habeas corpus relief |
| September 16, 1985 | FILED: Petition for Rehearing |
| November 19, 1985 | OPINION: denying Rehearing |
| February 6, 1986 | ORDER: by Justice Powell extending the time within which to file a petition for Writ of Certiorari until April 18, 1986 |
| April 18, 1986 | FILED: Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit |
| May 14, 1986 | FILED: Brief in Opposition to Petition for Writ of Certiorari |
| June 9, 1986 | ORDER: Granting Petition for Writ of Certiorari limited to Questions I, II and IV presented by the Petition, and granting leave to proceed *in forma pauperis* |

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

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Civil Action No. 83-337-ORL-CIV-11

JAMES ERNEST HITCHCOCK, PETITIONER

*v.*

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections, RESPONDENT

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**AMENDED PETITION FOR WRIT OF HABEAS CORPUS BY PERSON IN STATE CUSTODY**

To the Honorable John A. Reed, Jr., Judge of the United States District Court for the Middle District of Florida, Orlando Division:

1. The Circuit Court of the Ninth Judicial Circuit in and for Orange County, entered the judgment of conviction and sentence under attack. That court is located in Orlando, Florida.

2. Petitioner entered a plea of not guilty, and a judgment of conviction was thereafter entered on January 21, 1977 (T. 998).[1] An advisory sentence of death was returned on February 4, 1977 (TAS. 63), and the trial judge imposed death on February 11, 1977 (TS. 7-8).

3. Petitioner was sentenced to death by electrocution (TS. 7-8).

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[1] In referring to the trial and appellate record, petitioner will use the following abbreviations: "T" (guilt-innocence trial transcript), "TAS" (penalty trial transcript), "TS" (sentence-imposition proceeding transcript), and "R" (record on appeal).



4. Petitioner was indicted for first degree murder of Cynthia Ann Driggers (R. 1).

5. Petitioner entered a plea of not guilty.

6. Petitioner's guilt-innocence trial was before a jury and his sentencing trial included an advisory jury.

7. Petitioner testified at his guilt-innocence trial.

8. Petitioner appealed his conviction and sentence.

9. Petitioner's conviction and sentence were affirmed by the Florida Supreme Court, and rehearing was denied, on May 17, 1982. *Hitchcock v. State*, 413 So.2d 741 (Fla. 1982).

10. In addition to the above-mentioned direct appeal, petitioner has filed three petitions with respect to his judgment of conviction and sentence in other courts, and has been an applicant in executive clemency proceedings.

11. (a) Petitioner filed, in the Supreme Court of the United States, a petition for writ of certiorari to the Supreme Court of Florida on direct appeal. Certiorari was denied on October 18, 1982. *Hitchcock v. Florida*, —— U.S. ——, 103 S.Ct. 274, 74 L.Ed.2d 213 (1982).

(b) During the pendency of his direct appeal to the Supreme Court of Florida, petitioner joined 122 other death-sentenced persons in an original habeas corpus proceeding in the Supreme Court of Florida challenging that court's practice of reviewing *ex parte*, non-record information concerning petitioner's and other capital appellants' mental health status and personal backgrounds. The Supreme Court of Florida denied relief, *Brown v. Wainwright*, 392 So.2d 1327 (Fla. 1981), and the Supreme Court of the United States declined to review that decision by writ of certiorari, *Brown v. Wainwright*, 454 U.S. 1000 (1981).

(c) On February 22, 1983, petitioner appeared before the Board of Executive Clemency. On April 21, 1983, the Governor denied clemency and signed a death warrant effective from noon on May 13, 1983 to noon on May 20, 1983. Petitioner's execution was scheduled for Wednesday, May 18, 1983 at 7:00 A.M.

(d) Cn Tuesday, May 3, 1983, petitioner filed a Motion to Vacate Judgment and Sentence, pursuant to *Fla. R.Crim.P.* 3.850, in the Circuit Court of the Ninth Judicial Circuit, in and for Orange County [the trial court]. In connection with this motion, petitioner also filed pleadings seeking a stay of execution, as well as discovery, fees and expenses of expert witnesses, and expenses of lay witnesses in connection with an evidentiary hearing on petitioner's Rule 3.850 motion. On May 10, 1983, the circuit court denied the application for a stay of execution and denied the motion to vacate, without an evidentiary hearing. Thereafter, on May 17, 1983, the Florida Supreme Court affirmed the denial of the motion to vacate and refused to entertain a motion for rehearing with respect to its decision.

## STATEMENT OF THE FACTS

12. This case involves the death of thirteen-year old Cynthia Ann Driggers on July 31, 1976, in Winter Garden, Florida. Ms. Driggers' body was found in a shaded area behind her family's home between 3:00 and 3:30 P.M. on July 31, 1976 (T. 299). She had gone to bed at approximately the same time as the rest of her family the night before (T. 276), but when her mother had awakened at 6:00 A.M. on July 31, Ms. Driggers was not in her room (T. 251-252). She was not again seen until her body was discovered by her stepfather between 3:00 and 3:30 that afternoon. An autopsy revealed that the cause of death was asphyxiation as a result of strangulation (T. 496). The only other injuries revealed in the autopsy were facial lacerations and bruises in the vicinity of Ms. Driggers' eyes, apparently caused by a blunt object such as a fist (T. 499-501).[2]

[2] The medical examiner also testified that Ms. Driggers' hymen had been lacerated (T. 507-508), but further indicated that this was a normal occurrence for a young woman engaging in her initial experience of sexual intercourse (T. 518).



Finally, the autopsy revealed the presence of sperm in Ms. Driggers' vaginal cavity (T. 509).

13. The guilt-innocence phase of the trial centered upon whether Ernie Hitchcock (the petitioner) or his brother (also Ms. Driggers' stepfather), Richard, had committed the homicide. The state attempted to prove that Ernie had committed the homicide through the introduction of his confession. In his confession to the police on August 4, 1976—which was given at a time when, according to a psychiatrist appointed to evaluate Ernie's sanity and competence, Ernie was suffering a "moderately severe depression" (R. 27)—Ernie admitted killing Ms. Driggers. He said that he returned to the Hitchcock's home (where he had been temporarily living as well) at approximately 2:30 A.M. on July 31, 1976, entered the house through a dining room window, and went to Ms. Driggers' bedroom. (T. 691) He and Ms. Driggers had sex, after which she said she had been hurt and was going to tell her mother. (T. 691) He told her she couldn't but she persisted, and when he tried to stop her from leaving the room, she began to scream. (T. 691) He then covered her mouth, picked her up, and took her outside, where she still said she would tell her mother and again started to scream. (T. 691) He then started choking her and hit her several times and then continued choking her without knowing what was happening. (T. 692) When he realized that she was dead, he carried her body to some nearby bushes. (T. 692)

14. In the defense case at trial, Ernie Hitchcock testified and repudiated much of this confession. He explained that he had given a false confession because he was deeply depressed, and because he wanted to cover up his brother Richard's role in killing Ms. Driggers. (T. 772-773, 777) Richard had been like a father to him, and he wanted to be sure Richard stayed with his family. (T. 777) However, after he had given the false confession, his mother and sister came to see him frequently, restoring some hope for his life, and he decided to tell the truth

about the homicide. (T. 776-777) The truth was, he testified, the following. On the night of the homicide he was at home until about 10:30 P.M. (T. 757) He returned home about 2:30 A.M. after drinking beer heavily and smoking some marijuana. (T. 760-763) After he came home, he and Cynthia had consensual sexual relations, but were discovered by Richard. (T. 762-763) He then saw Richard take Cynthia out of the house and choke her. (T. 765) Ernie finally kicked Richard off her (T. 765), but she was already dead. (T. 766) Richard cried and asked Ernie what he could do. (T. 766) He then helped Richard hide the body (T. 766), and thereafter, went to the dining room window and pushed the screen off to make it look like some one had broken in. (T. 767) Ernie denied sexually assaulting Ms. Driggers (T. 783), and indeed in its case, the state presented no evidence that any violence or force had been exerted against Ms. Driggers prior to or during the sexual intercourse.[3]

15. At the close of the guilt-innocence trial, the jury was charged on both premeditated and felony murder in connection with murder in the first degree (T. 965-969).[4] The felony underlying the felony murder theory was "involuntary sexual battery," (T. 998), and was defined in the instructions as follows:

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[3] Except for the confession, the remainder of the state's case had gone to prove that Ernie Hitchcock had engaged in sex with Ms. Driggers and that her blood was on his pants. Neither of these facts was disputed, however, for Mr. Hitchcock conceded that he had engaged in sex with the victim and that he had gotten her blood on his pants in moving her body after Richard had killed her (T. 787).

[4] At the close of the state's case, the defense had moved for a judgment of acquittal, claiming insufficiency of the evidence to show either premeditation or felony murder (T. 711-712). The trial judge denied the motion as to premeditation but reserved ruling "until the close of all the testimony by both sides," as to felony murder (T. 712). At the close of the evidence, the judge denied the motion as to felony murder as well (T. 841).



> "It is a crime to commit sexual battery upon a person over the age of 11 years without that person's consent, and in the process use actual physical force likely to cause serious physical injury."

(T. 968) Despite instruction on both theories of first degree murder, however, the jury returned only a general verdict of "guilty of Murder in the First Degree." (T. 998)

16. In the sentencing trial which followed thereafter, the State presented no additional testimony (TAS. 6), and the defense presented only one witness, James Harold Hitchcock, another brother of the defendant. Mr. Hitchcock testified that Ernie had a habit of "sucking on gas" from automobiles when he was five or six years old, which caused him to "pass out" once; after that his "mind wandered." (TAS. 7-8) Mr. Hitchcock further testified that Ernie had come from a family with seven children, which earned its livelihood by hoeing and picking cotton. (TAS. 9-10) Their father had died of cancer after having been bedridden for eight months. (TAS. 8-9) Finally Mr. Hitchcock testified that Ernie had been close to his (James Harold's) children and had cared for them as a sitter. (TAS. 10)

17. Thereafter, the jury recommended that the judge impose a death sentence (TAS. 63), and he did (TS. 7-8). In support of the sentence, the judge entered findings of fact in which he found three aggravating circumstances[5] and one mitigating circumstance.[6]

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[5] "The murder of Cynthia Ann Driggers was committed while the defendant was engaged in the commission of an involuntary sexual battery . . . . [T]he defendant killed Cynthia Ann Driggers for one purpose only, to avoid being arrested after commission of the involuntary sexual battery . . . . The murder was especially heinous, wicked, or cruel." (R. 196-197)

[6] "At the time of the murder, defendant was 20 years of age. [This] [c]ircumstance . . . is applicable." (R. 197)

GROUNDS FOR HABEAS CORPUS RELIEF

* * * *

*Grounds for Relief From the Sentence*

19. The petitioner's death sentence was obtained in violation of his rights guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States, for each of the reasons more fully set forth below.

* * * *

B. *Petitioner's death sentence was imposed in proceedings which precluded, by operation of law, the consideration of relevant mitigating circumstances, in violation of the Eighth Amendment requirement that there be no bar to the presentation and consideration of relevant mitigating evidence.*

(1) The trial judge refused as a matter of law to consider numerous mitigating circumstances, in direct violation of *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

(a) The judge refused to consider as mitigating, uncontroverted credible evidence that petitioner suffered from mental and emotional problems which influenced his behavior at the time of the homicide.

(i) The evidence of relevant mental and emotional problems consisted of the following:

(aa) Petitioner's brother testified that when petitioner was young, he had a habit of inhaling gas from the gas tanks of automobiles (TAS. 7-8). He stated that he had seen petitioner pass out from this activity (TAS. 8), and that this affected petitioner's mind by making it wander (TAS. 8).

(bb) This early damage to petitioner's mind was compounded by his problems later in life. Petitioner's father died of cancer when he was six or seven (R. 194) His mother then had to work and take care of a family with several children (T. 775) Petitioner thereafter had continuing problems with his stepfather, who was always



cursing his mother and occasionally hit her (T. 773). Because of this, petitioner left home at thirteen and was on his own, drifting from place to place, thereafter (R. 194, T. 773).

(cc) On the night of the homicide, petitioner's mental and emotional vulnerabilities combined with an extremely stressful situation to create a set of circumstances he could not handle. Petitioner had consumed a large amount of marijuana (two cigarettes) and a large quantity of alcohol (two six packs of beer) before returning home that night. While suffering from various vulnerabilities to mental and emotional disturbance and while highly intoxicated, he was then faced with a pressure-packed situation. According to petitioner's "confession" he and the decedent engaged in sexual relations, and then she threatened to tell her mother (T. 691). Petitioner then completely lost control and did not know what to do and didn't know what happened. (T. 691).

(ii) The judge refused to consider these facts as mitigating, because he found the facts insufficient to establish the mitigating circumstances in the death penalty statute which were concerned with mental or emotional disturbance or duress or with impaired mental capacity. (R. 197) *See Fla. Stat.* § 921.141(6)(b), (e), (f).

(b) The judge also refused to consider as mitigating the following facts in evidence or inferences from facts in evidence: (i) petitioner's voluntary presentation of himself to the police (T. 726-727) at a time when he had an unrestricted opportunity to flee; (ii) petitioner's non-violent character and background, demonstrated by his lack of any violent criminal history (T. 790-791) and by his reputation for not resorting to violence (T. 733, 737, 739, 744, 747, 749); (iii) doubt about whether petitioner actually intended to kill the decedent, demonstrated as a matter of law by the judge's submission of the case to the jury on the felony murder theory as well as on the premeditated murder theory, and demonstrated as a matter of fact by petitioner's wholly irrational, out-

of-control mental and emotional state at the time of the homicide [*see* ¶ 19B (1)(a)(i), *supra*]; (iv) doubt, which was less than reasonable doubt, about guilt, demonstrated by petitioner's unwavering trial testimony denying the commission of the homicide; and (v) the prior offer of a plea of nolo contendere and life imprisonment by the state, with the court's approval (TS. 5-6). The judge clearly refused to consider these mitigating factors, for he made absolutely no mention of them—despite there having been established by the evidence—in his findings of fact in support of the death sentence (R. 194-198).

(c) The judge refused to consider the mitigating factors in ¶ 19B (1)(a) and (b), *supra*—even though they were all relevant to petitioner's character and record or to the circumstances of the offense and were thus "relevant" mitigating circumstances under the Eighth Amendment, *see Lockett v. Ohio*, 438 U.S. 586, 604-605 (1978) —because he believed that the only factors he could consider in mitigation were those listed in sub-section (6) of the Florida death penalty statute, *Fla. Stat.* § 921.141. This is demonstrated by the following statements in the judge's sentencing order and findings of fact in support thereof:

(i) The sentencing order reflects that the judge considered only statutorily-enumerated mitigating circumstances in concluding to impose death:

> "[a]fter weighing the aggravating and mitigating circumstances, this Court finds that sufficient aggravating circumstances exist as enumerated in Fla. Stat. 921.141 (5) to require imposition of the death penalty, and *there are insufficient mitigating circumstances as enumerated in Fla. Stat. 921.141 (6)*, to outweigh the aggravating circumstances."

(R. 192) (emphasis supplied).

(ii) The findings of fact reflect the same limitation in the consideration of mitigating circumstances.



> "In determining whether the defendant should be sentenced to death or life imprisonment, this Court is mandated to apply the facts to certain enumerated 'aggravating' and 'mitigating' circumstances."

(R. 195) Immediately after this statement, the judge evaluated the statutory aggravating circumstances and *only* the mitigating circumstances enumerated in the statute (R. 195-197). He made no mention of other mitigating factors established by the record, because these factors did not establish any of the statutory mitigating circumstances. As a matter of state law, such findings, confined only to a discussion of the *statutory* mitigating circumstances in evidence, demonstrate that nonstatutory mitigating circumstances were not considered. *See Moody v. State*, 418 So.2d 989, 995 (Fla. 1982).

(2) The trial judge's instructions to the jury likewise reflected his view that the death penalty statute limited the consideration of mitigating circumstances to those enumerated in the statute. Accordingly, the jury's consideration of mitigating circumstances was similarly restricted in violation of *Lockett v. Ohio supra*, and *Eddings v. Oklahoma, supra*. These instructions, which could have been construed by a reasonable juror to exclude any consideration of nonstatutory mitigating circumstances were the following:

(a) In his pre-penalty-trial charge to the jury, the judge instructed the jurors that after the close of evidence and argument by counsel, "I will then instruct you on the factors in aggravation and mitigation that you may consider under our law." (TAS 5)

(b) At the end of the trial, the trial judge instructed the jury that "[t]he aggravating circumstances which you may consider shall be limited to the following: [whereupon the eight statutory aggravating circumstances were read]." (TAS 54) Thereafter, in strikingly parallel words, the trial judge instructed the jury that "[t]he mitigating circumstances which you may consider shall be

the following: [whereupon the seven statutory mitigating circumstances were read]." (TAS. 56)

(c) At no time in his instructions to the jury did the trial judge inform the jury that they could consider any mitigating circumstances supported by the evidence in addition to the statutory mitigating circumstances specified in the instructions.

(d) Because of the repeated parallel references to "the aggravating and mitigating circumstances and the parallel language limiting consideration of aggravating and mitigating circumstances to enumerated circumstances, these instructions could well have led a reasonable juror to believe that he or she could not consider the mitigating circumstances which were in evidence but were unrelated to the seven enumerated mitigating circumstances.[8]

(e) Petitioner was severely prejudiced by the exclusion of nonstatutory mitigating circumstances from the consideration of the jury, for much of the mitigating evidence he presented fell into the category of nonstatutory mitigating circumstances. *See* ¶ 19B (1) (a) and (b), *supra.*

(3) The trial judge excluded evidence of a relevant mitigating factor, and the Florida Supreme Court approved the exclusion of that evidence as a matter of law, in violation of *Lockett v. Ohio, supra.*

(a) Petitioner's theory of defense was that his brother, Ricahrd Hitchcock, had killed Cynthia Ann Driggers after Richard discovered petitioner's and Ms. Driggers' sexual liaison during the night of July 31, 1976 (T. 760-792).

(b) To corroborate his own eyewitness testimony that this is what occurred, petitioner sought to prove three additional matters, including his brother Richard's repu-

[8] Moreover, the argument of the prosecutor treating the consideration of aggravating and mitigating circumstances as equally limited (TAS. 27-44) only served to reinforce such a reasonable view.



tation for being violent. *See* ¶ 18C, *supra.* This evidence was excluded, however. (T. 737, 739-741, 744, 745).

(c) The Florida Supreme Court held the evidence tendered in support of these matters was properly excluded, because the propositions themselves were irrelevant to whether the petitioner or Richard committed the murder, or to *any other material issue* in the case. *Hitchcock v. State, supra,* 413 So.2d at 744.

(d) Petitioner submits that these propositions indisputably tended to establish the relevant mitigating circumstance concerning doubt (less than "reasonable doubt") about guilt. *See* ¶ 18C (4), *supra.*

(e) The Supreme Court's approval of the exclusion of this evidence with respect to sentencing issues, as well as guilt issues, *Hitchcock v. State, supra,* was not only constitutionally erroneous for approving the exclusion of relevant mitigating evidence, however. It was also erroneous because it was based in part upon the notion that, in any event, the evidence related to a nonstatutory mitigating factor (doubt about guilt) which was excluded from consideration by exclusion from the statutory list of mitigating circumstances. *See Cooper v. State,* 336 So.2d 1133, 1139 (Fla. 1976) (approving the exclusion of similar evidence because, in part, it related to a nonstatutory mitigating circumstance).

(4) The available evidence of relevant nonstatutory mitigating circumstances was not investigated or presented in petitioner's sentencing trial, because of defense counsel's belief that the Florida death penalty statute limited the sentencer's consideration of mitigating circumstances to those enumerated in the statute. Under these circumstances, Mr. Hitchcock was deprived of a sentencing proceeding which satisfied Eight Amendment requirements, either by ineffective assistance of counsel or by operation of the Florida death penalty statute, or by both.

(a) The Eighth Amendment indisputably prohibits any statutory, or any other "operation-of-law" exclusion of

relevant mitigating evidence from the consideration of the sentencer in a capital sentencing trial. *Lockett v. Ohio, supra; Eddings v. Oklahoma, supra.* "Relevant" mitigating evidence, which cannot constitutionally be excluded, encompasses any evidence pertaining to the defendant's character and record and to the circumstances of the offense. *Lockett v. Ohio, supra.*

(b) This well-settled principle of constitutional law was violated in Mr. Hitchcock's case, however, either because at the time of his trial the Florida death penalty statute prohibited the introduction and consideration of nonstatutory mitigating evidence, or because his trial counsel ineffectively believed that the law operated in such a manner at the time of his trial. In any event, trial counsel, Charles A. Tabscott, believed that the Florida death penalty statute flatly prohibited the introduction and consideration of nonstatutory mitigating circumstances.

(c) At the time of Mr. Hitchcock's trial in January and February, 1977, the state of the law with regard to this matter was the following:

(i) Since the revision of the Florida death penalty statute effective on December 8, 1972, the statute included the following delimiting language concerning the aggravating and mitigating circumstances which could be considered by the jury and judge in determining the sentence in a capital trial:

> "Aggravating circumstances shall be limited to the following: . . . ." Florida Statutes, § 921.141 (5).
>
> "Mitigating circumstances shall be the following: . . . ." Florida Statutes § 921.141 (6).

(ii) In the first case to interpret the death penalty statute, *State v. Dixon*, 283 So.2d 1 (Fla. 1973), the Florida Supreme Court implied that the consideration of mitigating circumstances was limited in the same manner as the consideration of aggravating circumstances, by referring frequently to "the" mitigating circumstances



and including in such reference only the statutorily enumerated circumstances. Justice Ervin in dissent stated explicitly that there was such a limitation in an effort to comply with *Furman v. Georgia*, 408 U.S. 238 (1972). *State v. Dixon, supra*, 283 So.2d at 17.

(iii) There was no further judicial guidance concerning this matter until July, 1976, at which time the Supreme Court of the United States and the Supreme Court of Florida reached opposite conclusions with respect to this provision of the Florida statute. In *Proffitt v. Florida*, 428 U.S. 242 (1976), "six members of [the United States Supreme] Court assumed in approving the statute, that the range of mitigating factors listed in the statute was not exclusive." *Lockett v. Ohio, supra*, 438 U.S. at 606. Just six days thereafter, however, in *Cooper v. State*, 336 So.2d 1133 (Fla. 1976), the Florida Supreme Court held that "the range of mitigating factors listed in the statute," *Lockett, supra*, was exclusive:

> "The sole issue in a sentencing hearing under Section 921.141, Florida Statutes (1975), is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have no place in that proceeding . . . . The Legislature chose to list the mitigating circumstances which it judged to be reliable for determining the appropriateness of a death penalty . . . ."

336 So.2d at 1139. *See also id.* at 1139 n. 7.

(iv) Just six months after the decisions in *Proffitt* and *Cooper*—and without further guidance from either the Florida Supreme Court or the United States Supreme Court—Mr. Tabscott proceeded to trial on behalf of Mr. Hitchcock. *Lockett v. Ohio, supra*, the case which would definitively prohibit an exclusive statutory list of mitigating circumstances from limiting the consideration of relevant mitigating circumstances, would not be decided for another year and one half.

(d) With the law in this state, Mr. Tabscott believed that he could not present evidence unrelated to the statutory mitigating circumstances. Accordingly, he did not investigate the availability of such evidence on behalf of Mr. Hitchcock.

(e) Had such an investigation been undertaken, Mr. Tabscott would have discovered at least the following evidence of nonstatutory mitigating factors:

(i) Psychological testing and evaluation of Mr. Hitchcock would have supported the mitigating factor of uncertainty about guilt—lingering, genuine doubt about guilt which may not rise to reasonable doubt but which can, nonetheless, be a critical factor in mitigation. *See Green v. Georgia*, 442 U.S. 95 (1979); *Smith v. Balkcom*, 660 F.2d 573, 580-581 (5th Cir. 1981) (Unit B). Psychological evaluation would have shown that when faced with stressful situations, throughout his life beginning with his early childhood, Mr. Hitchcock's pattern of coping was to retreat and escape. Such a strongly entrenched coping mechanism would likely have pushed him to run, upon his sexual experience with Ms. Driggers becoming stressful (either by her threat to tell her mother or by Richard's discovery of what was going on). To turn upon Ms. Driggers instead and to kill her would have been totally incongruent with his lifelong pattern of behavior. [Testimony available from Dr. Elizabeth A. McMahon, clinical psychologist]. Thus, Mr. Hitchcock's psychological history and profile would have corroborated any lingering doubt about his guilt.

(ii) Testimony concerning the extraordinary hardships of Mr. Hitchcock's childhood and teenage years and the character traits he developed during these years, coupled with psychological evaluation concerning his strong capacity for living a lawful, productive life despite such horrible beginnings, would have supported the mitigating factor of Mr. Hitchcock's excellent potential for rehabilitation. *See Simmons v. State*, 419 So.2d 316, 320 (Fla. 1982).



(aa) Mr. Hitchcock's childhood and teenage years were a nightmarish reality of poverty, grief, emotional neglect, and uprootedness. Mr. Hitchcock was a member of a nine-person family whose only source of income was derived from the four-to-five month long cotton season in Arkansas, during which as many of the family members worked in the cotton fields as possible. When Mr. Hitchcock was seven years old, his father died of cancer, and the family's meager income was diminished significantly without his labor. During the seven or eight months when cotton was out of season, the family's sole source of income after his death was the children's $75.00 per month social security survivors' income. During all of his formative years, Mr. Hitchcock's family lived in farm tenant housing which was very small and without indoor plumbing. Food was frequently in scarce supply, and only occasional rabbits and the federal surplus commodity food program kept the family from starvation. Most of the children in Mr. Hitchcock's family wore clothing made from flour sacks. The death of Mr. Hitchcock's father brought other misery as well. Mr. Hitchcock had loved his father deeply, and he had a more difficult time rebounding from the loss of his father than did the other children. The father had also played the critical role of keeping the family together and building the love relationships within the family, and with his death the family literally disintegrated. Ernie had a growing feeling that he no longer belonged and when his mother remarried five years after his father's death (when Ernie was 12 years old), he stayed only one more year. During that year, he saw his stepfather become an acute alcoholic and witnessed an increasing barrage of physical and emotional abuse heaped upon his mother by his stepfather. Finally, at 13, he left. He became a thirteen year old adult, drifting from relative to relative, unable to sink roots or experience the feeling of being welcome anywhere. The meager home he had known has squeezed him out, and no one took him in. [Testimony available from

Deputy Sheriff Lee Baker, Mississippi County, Arkansas; Lorine Galloway (Mr. Hitchcock's mother); Betty Augustine (Mr. Hitchcock's sister); James Harold Hitchcock (Mr. Hitchcock's brother); Martha Galloway (Mr. Hitchcock's sister); Carroll Galloway (Mr. Hitchcock's brother-in-law); and Brenda Reed (Mr. Hitchcock's sister).]

(bb) Despite the harshest of the environments in which a child could grow into adolescence, Ernie Hitchcock developed and never lost solid character traits which all who knew him witnessed and admired. He always worked hard without complaining, often working ten hour days in the cotton fields well before his tenth birthday. He tried to pick up odd jobs to earn extra money, which he then shared with his family and with siblings' families. He got along well with other children. He was respectful toward adults. He tried his best to help his mother with daily chores after his father died. He helped other family members, once spending nearly six weeks in the household of his brother James Harold, performing household and child care duties while James' wife Fay recuperated from surgery. He saved his uncle, Charles Hitchcock, from drowning. While he worked as a fruit pricker in Florida, he was always willing to help others fill their bins after his was full. He was a person who won the respect and affection of others because of who he was. [Testimony available from the persons listed in ¶ 19 B (4) (e) (ii) (aa), *supra*, as well as from G. E. Motley, cotton farm supervisor, and Charles Hitchcock (uncle).]

(cc) These traits, strengthened by surviving despite the harshness of Mr. Hitchcock's environment, made Ernie Hitchcock an excellent candidate for rehabilitation, as psychologist Elizabeth McMahon determined in connection with Mr. Hitchcock's clemency application, on February 14, 1983:

> "James does not, in many respects, fit the more typical picture of those who commit violent acts against other individuals. His family, although very poor,



> was not physically abusive and the emotional neglect he experienced was more a function of ignorance and the circumstance than a function of intent. He does not evidence the same degree of immaturity, of strong drives toward immediate gratification, of impulsive acting out of emotions, or of hostility and aggression. His history is less one of antisocial behavior than it is one of a marginal lifestyle of 'getting by' and staying 'uninvolved' with others due to his own anxiety and fear of rejection. Even that level of anxiety and concern about the opinions and feelings or others is atypical of this population.
>
> If James' sentence were commuted and he were to be in 'population', there is every reason to believe that not only would he function well but he would be a positive influence. He has the ability to act in the role of an arbitrator and could probably assist in defusing situations that arise between inmates and staff and/or among inmates. Also, he is bright and has comprehended and retained considerable information from reading and from watching educational television. He would be able to handle any assignment such as the library, legal aide, etc. well.
>
> Should this occur, James should also have the opportunity of being involved in individual psychotherapy. Again, he is bright, articulate, capable of insight—all characteristics which make one a good candidate for traditional psychotherapy. Although he has gained much on his own, he now needs competent assistance to help him confront and deal with those aspects of his personality that are most scarey and anxiety-provoking for him—the issues of affection and dependency that he is most likely to avoid facing—and help him to integrate and consolidate the progress he has already made."

Dr. McMahon's evaluation would have been available in 1977 as well as in 1983 had Mr. Tabscott sought it, for

the traits observed by Dr. McMahon have been a part of Mr. Hitchcock all of his life.

(5) Petitioner suffered prejudice sufficient to require his death sentence to be vacated as a result of the non-investigation, non-presentation, exclusion (from evidence), and non-consideration of relevant mitigating factors, described in ¶¶ 19 B (1)-(4), *supra*.

(a) The mitigating factors described in the preceding paragraphs were "relevant" mitigating factors under *Lockett v. Ohio*, *supra*.

(b) *Eddings v. Oklahoma*, *supra*, requires the state courts "to consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances." 455 U.S. at 117. No further showing of prejudice—than the showing that the state courts did not consider "all relevant mitigating evidence"—is necessary to require a death sentence to be set aside. *Id.*

(c) Pursuant to *Eddings* and *Lockett*, therefore, the failure of the sentencer to consider the relevant mitigating factors alleged herein, for the reasons alleged herein, requires the death sentence to be vacated.

* * * *

E. *The Florida Supreme Court's cursory, incomplete review of the aggravating and mitigating circumstances in petitioner's case vitiated the court's unique responsibilities in the review of capital prosecutions.*

(1) The review conducted by the Florida Supreme Court in petitioner's case did not meet the constitutional requirements for appellate review enunciated in *Proffitt v. Florida*, 428 U.S. 242 (1976).

(a) In upholding the constitutionality of Florida's capital sentencing scheme, the United States Supreme Court relied upon the Florida Supreme Court's "[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case." *Id.* at 251. The appeal procedure was thus seen as an integral part of the



task of a capital sentencing scheme: to remove arbitrariness from the imposition of the death sentence. In the Supreme Court's view, review by the Florida Supreme Court served as a final check against the arbitrary imposition of death sentences, for it was a system "under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida 'to determine independently whether the imposition of the ultimate penalty is warranted.'" *Id.* at 253.

(b) The United States Supreme Court believed that the Florida Supreme Court would undertake "responsibly to perform its function of death sentence review with a maximum of rationality and consistency." *Id.* at 258. And that each case would be "conscientiously reviewed . . . to assure consistency, fairness, and rationality in the evenhanded operation of state law." *Id.* at 259-60. Upon this basis, Florida's form of review was thus deemed to be equivalent to the "specific form of review" provided by the Georgia statute and, accordingly, was of crucial importance to the constitutionality of Florida's capital sentencing scheme. Absent this independent, conscientious, and reliable method of review, the Florida capital sentencing statute would be subject to the arbitrariness and capriciousness condemned in *Furman v. Georgia*, 408 U.S. 238 (1972).

(c) In Mr. Hitchcock's case, the Florida Supreme Court failed to undertake the "conscientious review" necessary to assure "consistency, fairness, and rationality" between Mr. Hitchcock's case and other death penalty cases.

(i) The Florida Supreme Court failed to review the aggravating circumstances found in Mr. Hitchcock's case to be certain that these circumstances were applied in accordance with the established limits upon the application of such circumstances. *See* ¶ 19 A, *supra*.

(ii) The Florida Supreme Court failed to review expressly many of the errors asserted by Mr. Hitchcock in connection with the trial court's finding that there was

only one mitigating circumstance. This omission was particularly egregious in Mr. Hitchcock's case, for in other death penalty cases in which the trial judge has failed to find mitigating circumstances upon factual records similar to the record in his case, the Florida Supreme Court has reversed death sentences. The unreviewed errors include failure to find the nonstatutory mitigating circumstance of Mr. Hitchcock's potential for rehabilitation, as argued by counsel in connection with the age of petitioner (TAS. 23-25; TS. 5), *see Simmons v. State*, 419 So.2d 316 (Fla. 1982); the failure to find the nonstatutory mitigating circumstance of mental or emotional problems (which are demonstrated but do not meet the criteria of a statutory mitigating circumstance), as alleged in paragraphs 19 B (1) (a) and (b), *supra*, *see Moody v. State*, 418 So.2d 989 (Fla. 1982); and the failure to find doubt about guilt, as alleged in paragraph 19 B (1) (b), *supra*, *see Taylor v. State*, 294 So.2d 648, 652 (Fla. 1974).

(d) Accordingly, the Florida Supreme Court's "[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case," *Proffitt v. Florida*, *supra*, 428 U.S. at 251, was revoked in Ernie Hitchcock's case.

* * * *

G. *As applied, the Florida death penalty statute violates the Eighth and Fourteenth Amendments because it fails to channel jury discretion and permits the interjection of irrelevant factors into the sentencing process by the jury and the judge.*

* * * *

(2) The death penalty is imposed in Florida in an arbitrary, capricious and irrational manner, based upon factors precluded from consideration by the Florida death penalty statute and the United States Constitution, in-



cluding but not limited to geographical differences in the willingness to seek and impose the death penalty, the economic status of the defendant, the sex of the defendant, the occupation of the victim, the race of victim, and the prior relationship between the victim and the defendant.

(a) With respect to the factor of geography, preliminary studies have shown that Orange County sentences people to death in statistically significantly greater proportion than in other metropolitan areas in Florida and than in the State as a whole. From whatever perspective the statistics are examined, the results show the same disparity. Orange County sentences to death 16.3% of the persons indicted for first degree compared to 8;6% in other metropolitan areas and 9.1% statewide (significance: .0578 and .039 respectively). Orange County sentences to death 41.7% of the persons convicted of first degree murder, compared to 22.5% in other metropolitan areas and 24.3% statewide (significance: .032 and .031 respectively). Orange County sentences to death 54.2% of the persons convicted of first degree murder in which a felony is involved, compared to 32.0% in other metropolitan areas and 35.0% statewide (significance: .105 for statewide comparison). See the testimony concerning the preliminary study from which these figures were drawn, developed in *Henry v. Wainwright*, attached hereto as Exhibit A.

(b) On the basis of a twenty-one county study (including Orange County) concerning all cases from 1972 through 1978 in which first degree murder indictments were returned, conducted by Professor Linda A. Foley, of the University of North Florida, the sex of the offender is significantly related to the imposition of the death penalty in Florida. Professor Foley reports that only 1.6% of women indicted for first degree murder received the death penalty in her study of Florida cases, compared to 12.4% of men indicted for first degree murder (statistical significance: .02). *See* Professor Foley's report of her study, attached hereto as Exhibit B, at p. 7.

(c) On the basis of the Foley study, the occupation of the victim is significantly related to the imposition of the death penalty in Florida. Among persons indicted for first degree murder, 11% received the death penalty if their victims were in skilled jobs, and 27% received the death penalty if their victims were in professional jobs (significance: .019). *See* Exhibit B, at p. 8.

(d) On the basis of Professor Foley's study the race of the victim is significantly related to the imposition of the death penalty in Florida. Of those persons in her study (regardless of their race) who were charged with the murder of a white victim, 16.5% received the death penalty, compared to only 2.8% of those charged with the murder of a black victim (significance: .00001). *See* Exhibit B, at 7.

(e) Given the opportunity for discovery, defendant submits that a similar prima facie case of arbitrary imposition of the death penalty can be demonstrated with respect to the economic status of the defendant, the prior relationship between the victim and the defendant, and other impermissible factors.

* * * *

(4) Because of an inherent ambiguity in the Florida death penalty statute concerning the scope of mitigating circumstances which could be considered in sentencing, persons tried under the statute prior to July 3, 1978 were deprived of their right to a fully individualized sentence determination under the Eighth and Fourteenth Amendments.

(a) Since the revisions of the Florida death penalty statute effective on December 8, 1972, the statute has contained the following delimiting language concerning the aggravating and mitigating circumstances which may be considered by the jury and judge in determining the sentence in a capital trial:

> "Aggravating circumstances shall be limited to the following: . . . ." § 921.141(5).



> "Mitigating circumstances shall be the following: . . ." § 921.141(6).

(b) Because of the slight difference in the wording of these phrases, the statute was ambiguous as to whether mitigating circumstances not enumerated in the statute could be considered. In 1976, the Supreme Court of Florida held expressly that non-enumerated mitigating circumstances *could not* be considered in *Cooper v. State*, 336 So.2d 1133, 1139 n.7 (Fla. 1976). However, just two years therafter, the Court held that the statute had always permitted the consideration of non-enumerated mitigating circumstances in *Songer v. State*, 365 So.2d 696, 700 (Fla. 1978). At the very least, therefore, this provision of the Florida death penalty was ambiguous. Further, the Supreme Court of Florida has agreed that it was ambiguous, at least by implication. By recognizing that the trial courts, in refusing to consider non-statutory mitigating circumstances prior to *Songer*, were following the law as they believed it to have been interpreted at the time, the Court has conceded the ambiguity inherent in this provision of the statute. *See Jacobs v. State*, 396 So.2d 717, 718 (Fla. 1981); *Perry v. State*, 395 So.2d 170, 174 (Fla. 1981).

(c) This ambiguity in the statute led to the consistent practice by defense counsel of limiting their investigation of mitigating circumstances to those enumerated in the statute, and to the equally consistent practice by Circuit Court judges of refusing to consider non-statutory mitigating circumstances. Not until *Lockett v. Ohio*, 438 U.S. 586 (1978) was decided on July 3, 1978 was there a clear constitutional mandate overriding the ambiguity in the statute and requiring defense counsel to investigate and Circuit Court judges to consider, evidence of non-statutory mitigating circumstances.

(d) Accordingly, capital defendants tried between December 8, 1972 and July 3, 1978, including Mr. Hitchcock, were systematically deprived of the fully individualized consideration of their character and record and of

the circumstances of their offense, to the extent that evidence of these matters fell outside the enumerated mitigating circumstances. During this period, therefore, as applied, the Florida death penalty statute deprived capital defendants of their Eighth and Fourteenth Amendment rights articulated in *Lockett v. Ohio, supra.*

* * * *

*Other Required Information*

20. Each of the grounds listed in paragraphs 18 and 18 has been previously presented to the Supreme Court of Florida, and each has been rejected, or was in the process of being presented to the Florida courts through post-conviction proceedings pending at the time this petition was drafted.

21. There are no appeals pending in any state or federal courts relating to the judgment and sentence under attack, except as noted in paragraph 11, *supra.*

22. Petitioner has been represented by the following counsel:

(a) at trial and sentencing, by Charles A. Tabscott, of Orlando, Florida;

(b) on appeal to the Supreme Court of Florida, by Richard L. Jorandby, Esquire, et. al, of West Palm Beach, Florida;

(c) In Florida 3.850 and other collateral proceedings, by the undersigned counsel; and

(d) in 3.850 appeal to the Supreme Court of Florida, by the undersigned counsel.

23. Petitioner was sentenced on the only count of the Indictment.

24. Petitioner has no other sentence of imprisonment to serve other than the sentence which is challenged herein.

WHEREFORE, Petitioner Hitchcock prays:

1. That this Court forthwith issue an order staying his execution pending final disposition of this matter and further order of this Court;



2. That a writ of habeas corpus be directed to Respondents;

3. That the State of Florida be required to appear and answer the allegations of this petition;

4. That Petitioner be accorded a de novo evidentiary hearing on the allegations of this petition, at which he is present, since he did not receive a full and fair evidentiary hearing in state court, as required by *Townsend v. Sain*, 372 U.S. 293, 312 (1963);

5. That, after full hearing, Petitioner be discharged from his unconstitutional confinement and restraint and/or relieved of his unconstitutional sentence of death;

6. That Petitioner, who is indigent, be granted sufficient funds to secure expert testimony and lay testimony necessary to prove the facts as alleged in his petition;

7. That Petitioner be granted the authority to proceed *in forma pauperis*, including the right to obtain subpoenas *in forma pauperis* for witnesses and documents necessary to prove the facts as alleged in the petition;

8. That Petitioner be allowed a period of sixty days, which shall commence after the completion of any hearing this Court determines to conduct, in which to brief the issues of law raised by this petition;

9. That Petitioner be allowed to amend this petition up to and including the commencement of the hearing requested herein; and

10. That Petitioner be allowed other, further and alternative relief as may seem just, equitable, and proper under the circumstances.

Respectfully submitted,

[Names/Addresses of Counsel Omitted in Printing]

[Certificate of Service Omitted in Printing]

[Verification of Petitioner Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

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Civil Action No. 83-357-Civ-Orl-11

[Title Omitted in Printing]

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**MOTION FOR PAYMENT OF EXPENSES OF WITNESSES, FOR FEES OF EXPERT WITNESSES, AND FOR LEAVE TO TAKE DISCOVERY**

Petitioner, JAMES ERNEST HITCHCOCK, by and through his undersigned counsel, moves this Honorable Court for an order (1) allowing reasonable expenses and fees to employ experts to enable Petitioner to adequately present proof regarding allegations in his Petition for Writ of Habeas Corpus; (2) allowing reasonable expenses for lay witnesses; (3) requiring the State to produce the documents or provide the information necessary for these experts' analysis, or in the alternative, providing the necessary expenses and fees for the collection of such information by the Petitioner; and (4) allowing Petitioner to take discovery regarding allegations in his petition for a writ of habeas corpus. As grounds therefore, Petitioner states:

1. Petitioner was adjudicated guilty of first degree murder on January 21, 1977, and was sentenced to death on February 11, 1977.

2. Petitioner has filed with this Court his amended petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

3. Petitioner is currently indigent and is represented by the Office of the Public Defender, Fifteenth Judicial Circuit, West Palm Beach, Florida. Petitioner has previ-



ously been declared indigent for trial and appellate proceedings in this cause, and has been allowed to proceed *in forma pauperis* herein.

*Application of Death Penalty on Basis of Arbitrary Factors*

4. Petitioner's habeas corpus alleges, *inter alia*, the arbitrary, disparate, and disproportionate application of the death penalty in Florida. Specifically, paragraph 19G(2) of the petition alleges:

> "The death penalty is imposed in Florida in an arbitrary, capricious and irrational manner, based upon factors precluded from consideration by the Florida death penalty statute and the United States Constitution, including but not limited to, geographical differences in the willingness to seek and impose the death penalty, the economic status of the defendant, the sex of the defendant, the occupation of the victim, and the race of the victim."

The issue concerns, therefore, the actual application of the death sentence in Florida and the showing that in practice the perceived controls in the Florida capital sentencing statutory scheme are inadequate to channel the sentencing discretion of judges and juries sufficiently to meet the Eighth Amendment commands of *Furman v. Georgia*, 408 U.S. 238 (1972). The death penalty is unique among all criminal punishments and thus mandates a unique need for fairness and freedom from arbitrary imposition—in short for reliability. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). Accordingly, it is constitutionally required that the imposition of the death penalty be evenhanded and consistent. *See Proffitt v. Florida*, 428 U.S. 242, 258-260 (1976). The evidence of its application, which Petitioner intends to show to this Court, reveals gross disparities in its imposition from county to county and from case to case, dependent primarily on the presence or absence of illegitimate factors. The existence of such wide disparity in the Florida capital sentencing scheme does not meet the standard of evenhanded application. Moreover,

the pattern of the actual application of the death sentence demonstrates that the statutes does not function to channel sentencing decisions and that it is imposed in a wanton, freakish and irrational manner such as to shock the conscience in violation of the Eighth Amendment.

5. The preliminary data in support of this issue and available to Petitioner at this time are contained in Appendices A and B to the Petition for Writ of Habeas Corpus. In summary fashion the data shows the following, as alleged in the petition:

(a) With respect to the factor of geography, the death penalty is nearly two and one-half times more likely to be imposed in the panhandle than in the southern portion of the state; the northern and central regions fall about midway between these two extremes. The probability that such differences occurred by chance, given even-handed disposition of the death penalty and comparable offenses committed across the state, is extremely low, well beyond accepted standards of chance variation—.002. the preliminary data will show that the death sentence is imposed with grossly disproportionate frequency in Orange County. Specifically Petitioner alleges that the data will demonstrate that approximately the same percentage of homicide charges result in first degree murder indictments in Orange County as compared to the other regions of the state; that the percentage of death sentences as compared to the first degree murder indictments, first degree murder convictions, and first degree felony murder convictions is grossly disporportionate in Orange County; that such figures are statistically significant; and that there is no legitimate factor which can explain these disparities. Further, Petitioner submits that, as shown by the preliminary data, the broader data will show that the death penalty is imposed with grossly disporportionate frequency, in Orange County and in Florida.

(b) On the basis of a twenty-one county study (including Orange County) concerning all cases from 1972 through 1978 in which first degree murder indictments were returned, conducted by Professor Linda A. Foley,



of the University of North Florida, the sex of the offender is significantly related to the imposition of the death penalty in Florida. Professor Foley reports that only 1.6% of women indicted for first degree murder received the death penalty in her study of Florida cases, compared to 12.4% of men indicted for first degree murder (statistical significance: .02).

(c) On the basis of the Foley study, the occupation of the victim is significantly related to the imposition of the death penalty in Florida. Among persons indicted for first degree murder, 11% received the death penalty if their victims were in unskilled jobs, 25% received the death penalty if their victims were in skilled jobs, and 27% received the death penalty if their victims were in professional jobs (significance: .019).

(d) On the basis of Professor Foley's study, the race of the victim is significantly related to the imposition of the death penalty in Florida. Of those in her study charged with the murder ot a white victim, 16.5% received the death penalty, compared to only 2.8% of those charged with murder of a black victim (significance: .00001).

6. These data, as further analyzed in Appendices A and B to the habeas corpus petition establish at least prima facie grounds for relief and are proffered in support of this motion.

7. For complete analysis of this issue, however, data beyond that now available to Petitioner must be obtained. To the extent that other factors, such as aggravating and mitigating circumstances, may legitimately explain the disparities thus far revealed, Petitioner is entitled to analyze those factors and present the results of that analysis.[1] To the extent that there are other illegitimate factors related to the imposition of the death penalty in

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[1] Particularly in light of this Court's concerns in *Henry*, regarding "the nature of the offense itself" (Amended Petition for a Writ of Habeas Corpus, Appendix A, 162-164), such discovery is not only appropriate but necessary.

Florida, such as the economic status of the defendant or the degree of prior relationship between the defendant and the victim, Petitioner is entitled to analyze and present data relevant to such factors. For these reasons, Petitioner requests that the Court require the state to provide him with the following data, or documentation from which the following data can be obtained, or in the alternative, that he be provided with sufficient funds to cover the costs of obtaining the following data:

(a) the yearly and total number of homicides committed in the entire state, by county, from January 1, 1973 to the present;

(b) the yearly and total number of first degree murder indictments, broken down between premeditated and felony murder, in the entire state by county, from January 1, 1973 to the present;

(c) the yearly and total number of first degree murder convictions, broken down between premeditated and felony murder, in the entire state, by county, from January 1, 1973 to the present;

(d) the yearly and total number of death sentences imposed in the entire state, by county, from January 1, 1973 to the present;

(e) with respect to the data in (a), the race, occupation, income, and sex of the victims of all homicides;

(f) with respect to the data in (b), (c), and (d), the race, occupation, income, and sex of, and the degree of prior relationship between each victim and each defendant; and

(g) with respect to the data in (d), the aggravating and mitigating circumstances in each case, along with a description of the type of murder, including the cause of death.



8. The data and statistical analysis referred to in paragraph 5, *supra*, are encompassed in a study of twenty Florida counties, including Orange County, for the period of 1973-1978.[2] Since that study, other researchers at Stanford University, Professors Sam Gross and Robert Mauro, have updated and expanded the data and are currently in the process of analyzing the data. [Their data, however, does not encompass the breadth of data which Petitioner seeks to discover, *see* paragraph 7, *supra*.] Because the analysis of such data requires expert assistance—without which Petitioner cannot meaningfully pursue the facially valid claim to which the analysis of the data is relevant—Petitioner seeks, in addition to discovery, the provision of reasonable fees and expenses for experts. Specifically, he requests that he be allowed to retain the services of Professors Gross and Mauro and such other experts as may be necessary for the meaningful prosecution of this claim.

* * * *

*Imposition of the Death Penalty Without Consideration of Available Evidence on Non-Statutory Mitigating Factors*

9. In paragraph 10 B(4) of his petition for writ of habeas corpus, Petitioner has stated various grounds for

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[2] The Court may further recall from the *Henry* hearing that there was a discrepancy in the reported number of capital indictments occurring during the study period in Orange County, with Mr. Pierce testifying for the Petitioner that there were 92 indictments *for first degree murder* during this period (Transcript of Proceedings, *Henry v. Wainwright*, No. 79-584-Orl-Civ-R, January 11, 1980, at p. 153) and with Mr. Fasnacht testifying for the Respondent that there were 118 *capital* indictments during that period (*id.* at 186-191). To the extent that this seeming discrepancy may have undermined this Court's confidence in the testimony presented by Mr. Pierce, this should no longer have any effect, for counsel has subsequently discovered the reason for the discrepancy. Mr. Fasnacht's number included capital, non-murder indictments for sexual battery, [*Fla. Stat.* § 794.011(2)], as well as capital murder indictments. The difference can be accounted for by the inclusion of the non-murder indictments in Mr. Fasnacht's figure.

vacating the sentence imposed upon him, all of which rely on the same underlying facts: that there was significant non-statutory mitigating evidence which was available to be presented at the time of Mr. Hitchcock's trial.

10. In connection with executive clemency proceedings, Petitioner has investigated and developed substantial non-statutory mitigating evidence which was available at the time of his trial. The expenses and assistance of counsel in this regard were (or will be) compensated pursuant to the provision of funds for clemency proceedings. However, clemency funds will not provide the assistance necessary to produce the testimony of expert and lay witnesses in Petitioner's habaes corpus proceeding. In order for Petitioner to be able to adduce the evidence in support of his claims in paragraph 19 B(4) of his petition, he must be provided funds to compensate his expert witness and for expenses for his expert witness and lay witnesses necessary to prove his claims. Without such funds, Petitioner, who is indigent and without the means to secure the presence of said witnesses, will not be afforded the opportunity for a full and fair hearing. [The state courts denied these funds, and Petitioner was unable to present these witnesses].

11. Accordingly, Petitioner requests that the Court order sufficient funds for the following: (a) the expert witness fee of Dr. Elizabeth A. McMahon, in connection with these proceedings; (b) the expenses of Dr. McMahon in connection with these proceedings; and (c) the expenses of the lay witnesses necessary to establish the claims specified herein, including Deputy Sheriff Lee Baker, of Manila, Arkansas; Betty Augustine (Mr. Hitchcock's sister), of Manila, Arkansas; Martha Galloway (Mr. Hitchcock's sister), of Leachville, Arkansas; Brenda Reed (Mr. Hitchcock's sister), of Evansville, Tennessee; and Charles Hitchcock (Mr. Hitchcock's uncle), of Manila, Arkansas.

* * * *



WHEREFORE, Petitioner respectfully requests this Court to grant this motion for payment of expenses of witnesses' fees of experts and for leave to take discovery.

Respectfully submitted,

[Names/Addresses of Counsel Omitted in Printing]

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

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Civil Action No. 83-357-Civ-Orl-11

[Title Omitted in Printing]

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**MOTION FOR EVIDENTIARY HEARING**

Petitioner, JAMES ERNEST HITCHCOCK, by the undersigned counsel, moves this Court for an order setting certain issues raised in Petitioner's amended habeas corpus petition for an evidentiary hearing, as provided for by 28 U.S.C. § 2254 and Rule 8 of the Rules Governing Section 2254 Cases in the United States District Court. In support of this request, Petitioner sets forth the following:

1) In his amended habeas corpus petition, Petitioner has raised two grounds for relief which require an evidentiary hearing: the grounds set forth in ¶ 19B(4) and ¶ 19G(2) of the amended petition.

2) As argued in the accompanying memorandum in support of this motion, each ground states a substantial claim for habeas corpus relief and each requires relief upon a showing of the truth of the underlying facts. The facts which Petitioner will present at an evidentiary hearing upon these claims are summarized herein.

3) In ¶ 19B(4), Petitioner asserted that

> "[t]he available evidence of relevant non-statutory mitigating circumstances was not investigated or presented in Petitioner's sentencing trial, because of defense counsel's belief that the Florida death penalty statute limited the sentencer's consideration of mitigating circumstances to those enumerated in the statute. Under these circumstances, Mr. Hitchcock was deprived of a sentencing proceeding which satisfied Eighth Amendment requirements, either by ineffective assistance of counsel or by operation of the Florida death penalty statute, or by both."



Petitioner will present the following testimony in support of this ground:

(a) Charles Tabscott, Petitioner's trial counsel, will testify that at the time he represented Petitioner, he believed that the Florida death penalty statute, as construed by the Florida Supreme Court, permitted the jury and trial judge to consider only the circumstances enumerated in the statute in mitigation of punishment. Operating under this belief, Mr. Tabscott will testify that he focused upon the statutory mitigating circumstances in his pre-trial investigation and preparation as well as in his presentation of evidence and argument at trial. (*See* the affidavit of Mr. Tabscott, attached hereto as Exhibit A.)

(b) To demonstrate the evidence of nonstatutory mitigating circumstances which could have been presented—had Mr. Tabscott believed that the law permitted the presentation of such evidence—Petitioner will then call various witnesses.

(i) Dr. Elizabeth A. McMahon will testify concerning her psychological evaluation of Mr. Hitchcock in January, 1983. This comprehensive evaluation was conducted "to assess [Mr. Hitchcock's] psychological functioning at the present time and as it might relate to an incident of homicide which occurred on August 31, 1976, for which he has been convicted and sentenced to death." (Psychological Report by Dr. McMahon, February 14, 1983, p. 1, attached hereto as Exhibit B.) Dr. McMahon's testimony will indicate that a similar evaluation at the time of trial could have established two non-statutory mitigating circumstances in favor of Mr. Hitchcock. The first is lingering doubt about Mr. Hitchcock's guilt. Dr. McMahon's

evaluation has revealed that when faced with stressful situations, throughout his life beginning with his early childhood, Mr. Hitchcock's pattern of coping was to retreat and escape. Such a strongly entrenched coping mechanism, according to Dr. McMahon, would likely have pushed him to run upon his sexual experience with Ms. Driggers becoming stressful (either by her threat to tell her mother or by Richard's discovery of what was going on). To have turned upon Ms. Driggers instead and to have killed her would have been totally incongruent with his lifelong pattern of behavior. The second nonstatutory mitigating circumstance (which could have been established on the basis of a comprehensive psychological evaluation) is Mr. Hitchcock's unusual potential for rehabilitation. Unlike "the more typical picture of those who commit violent acts against other individuals," Dr. McMahon will testify that Mr. Hitchcock does not "evidence the same degree of immaturity, of strong drives towards immediate gratification, of impulsive acting out of emotions, or of hostility and aggression" and does not present a "history . . . of antisocial behavior . . . ." Accordingly, Dr. McMahon will testify that Mr. Hitchcock's potential for rehabilitation is great, that this potential could have been recognized at the time of trial, and that during the time since trial, Mr. Hitchcock has taken important steps toward full rehabilitation.

(ii) To demonstrate more fully the evidence that could have been presented regarding his potential for rehabilitation, Petitioner will then call various lay witnesses whose testimony could have established the substantiality of his good character because of the environment in which he grew up.

(aa) Lee Baker, a long-time friend of Mr. Hitchcock and his family and a deputy sheriff in Mississippi County, Arkansas, for 32 years, will testify that he first met Mr. Hitchcock when he was approximately seven years old, when Mr. Hitchcock's father was dying of cancer; that after his father's death, Mr. Hitchcock's



mother had a hard time making a living, which caused the children severe hardship; that when Ms. Hitchcock remarried, the man she married had a severe drinking problem which caused much worry on the part of Mr. Hitchcock; that Mr. Hitchcock was a very sensitive boy, who worried about his family's economic problems, and who consistently tried to help out in the family; and that Mr. Hitchcock was always a good worker, even at a very young age, always got along well with other children, was very respectful toward adults, and never had a problem with fighting or violence.

(bb) Martha Galloway, one of Ms. Hitchccok's sisters, who is two years older than he, will testify that Mr. Hitchcock was "torn apart" by the death of his father and grieved over his father's death for a long time thereafter; that their family fell apart after the father's death because he had "kept the family together and kept things in order"; that the family's poverty grew even more desperate after the father's death, requiring all of the children to work frequent twelve-hour days in the cotton fields just to survive—but even then only to maintain a foothold, under conditions in which housing, clothing, and food were just barely enough to permit survival; and that upon their mother's remarriage to a man with a severe drinking problem, who became terribly abusive and violent toward their mother when he drank, Ernie grew increasingly worried and finally left home when he could no longer cope with this situation and the anxiety it created.

(cc) Brenda Reed, one of Mr. Hitchcock's sisters, who is four years younger than he, will testify in greater detail concerning the environment created in their home by their stepfather's drinking and abuse of their mother and the tension which this created between the stepfather and the children.

(dd) Betty Augustine, one of Mr. Hitchcock's sisters, who is eleven years older than he, will testify about her experiences with Mr. Hitchcock in which he, even as a

young child, would help his mother with daily household chores, and in which, after Ms. Augustine started her own family, Mr. Hitchcock would help her feed and take care of her children.

(ee) James Harold Hitchcock, Mr. Hitchcock's brother who is fifteen years older than he, will testify about the homeless, uprooted feeling experienced by Mr. Hitchcock when their father died and how that feeling seemed to influence his behavior from that point on in his life. He will further testify about Mr. Hitchcock's admirable capacities as a worker, on the basis of their having worked together periodically over the course of their lives, and about Mr. Hitchcock's helpfulness toward other people, on the basis of the help extended to him and his family by Mr. Hitchcock.

(ff) Charlie Hitchcock, one of Mr. Hitchcock's uncles, will also testify about Mr. Hitchcock's helpfulness toward other people, on the basis of the help Mr. Hitchcock gave him in performing chores associated with farmwork. He will also testify about an incident in which Mr. Hitchcock saved him from drowning after he had fallen into a river at a time when he was drunk.

4) In ¶ 19G(2), Petitioner asserted that:

> "[t]he death penalty is imposed in Florida in an arbitrary, capricious and irrational manner, based upon factors precluded from consideration by the Florida death penalty statute and the United States Constitution, including but not limited to geographical differences in the willingness to seek and impose the death penalty, the economic status of the defendant, the sex of the defendant, the occupation of the victim, the race of the victim, and the prior relationship between the victim and the defendant."

In the accompanying Motion for Payment of Expenses of Witnesses, for Fees of Expert Witnesses, and for Leave to Take Discovery, at pages 2-6, Petitioner has detailed the evidence now available, as well as the discovery and



expert assistance necessary to develop additional evidence, in relation to this claim. Following the completion of discovery and analysis of the newly-discovered data by experts, Petitioner will be able to provide a summary of the evidence which he will present in support of this claim at the evidentiary hearing requested herein.

WHEREFORE, Petitioner requests that the Court enter an order permitting an evidentiary hearing with respect to the issues raised in ¶ 19B(4) and ¶ 19G(2) of the amended petition for a writ of habeas corpus filed herein.

Respectfully submitted,

[Names/Addresses of Counsel Omitted in Printing]

[Certificate of Service Omitted in Printing]

**[APPENDIX TO MOTION FOR EVIDENTIARY HEARING]**

[EXHIBIT A]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

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[Title Omitted in Printing]

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AFFIDAVIT OF CHARLES A. TABSCOTT

[Jurat Omitted in Printing]

Charles A. Tabscott, being duly sworn according to law, deposes and says:

1. I am an attorney duly licensed to practice my profession in the State of Florida. My office address is 46 Park Lake Street, Orlando, Florida 32803.

2. I am the attorney who represented JAMES ERNEST HITCHCOCK in pre-trial and trial proceedings in 1976 and 1977. My representation of Mr. Hitchcock was undertaken in the course of my employment as an assistant public defender.

3. I am aware of the current status of Mr. Hitchcock's case and of the claim that has been made in Rule 3.850 proceedings, and now in this proceeding, that available evidence of relevant non-statutory mitigating circumstances was not investigated or presented in Mr. Hitchcock's sentencing trial.

4. I do not have an independent recollection of whether I believed the Florida death penalty statute limited consideration of mitigating circumstances to the statutory



factors at the time of Mr. Hitchcock's trial. However, upon reviewing the trial transcript in Mr. Hitchcock's case, it is my opinion that during my representation of Mr. Hitchcock, my perception was that the consideration of mitigating circumstances was limited to the factors enumerated in the statute. I believe that I was acting in accord with such a perception on the basis of the argument I presented in the penalty phase of his trial.

5. While I now know that there is no such limitation of the consideration of mitigating circumstances, I did in the past believe that the statute limited the consideration of mitigating circumstances to the statutory factors. I do not recall precisely when my perception of the requirements of Florida law changed; however, based on my current review of the case law and transcript, it appears that my perception changed subsequent to Mr. Hitchcock's trial.

/s/ Charles A. Tabscott
CHARLES A. TABSCOTT

[Dated June 1, 1983]

[Jurat Omitted in Printing]

[EXHIBIT B]

ELIZABETH A. McMAHON, PH.D.

[Return Address/Letterhead Omitted in Printing]

February 14, 1983

*Psychological Report*
*Confidential Material* *James Ernest Hitchcock*

James Ernest Hitchcock is a 26 year old white single male who was evaluated at Florida State Prison on January 28, 1983, at the request of his attorney, Richard B. Greene, Esq. The purpose of the examination was to assess James' psychological functioning at the present time and as it might relate to an incident of homicide which occurred on August 31, 1976, for which he has been convicted and sentenced to death. Details of this event, as related in James' confession and his later statement at trial, are available elsewhere and, for the sake of brevity, will not be repeated here.

In addition to an extensive diagnostic interview, the following procedures were administered: Peabody Picture Vocabulary Test (PPVT), Rorschach, Hand Test, and Projective Drawings.

*Test Results*

There is no indication in any of the test material or interview data of a major thought disorder or a major affect disturbance. James' score on the PPVT indicates that he is currently functioning with the Average Range of Intelligence. The personality evaluation revealed an extremely tense, anxious individual whose anxiety, at time, interferes with his ability to adjust. His percepts reflect feelings of helplessness in the face of severe environmental forces beyond his control that are perceived as threatening his personality organization. James tends



to deal with his anxiety by repression or by intellectualization and compulsiveness.

His projective material indicates good ties with reality, an awareness of moderate impulse toward gratification, and normal strength of unacculturated drives. He is introversive and somewhat self-absorbed, evidencing an ability to be introspective and to combine this with social awareness in efforts at problem solving. James' responses to the objective characteristics of the stimuli reflect sufficient rational control of his behavior and the potential to handle situations impersonally when the need arises.

Severe frustrations of affectional needs, probably originating in early childhood, and the need for dependency relationships can be seen in his texture-determined percepts. However, also evident is the repression or denial of these needs and the inhibition of any efforts to meet them for fear of rejection. This has resulted in anxiety and in excessive caution and constraint in interpersonal relationships. Indications of feelings of rejection, isolation, insecurity, inferiority and unrealized dependency can also be seen in the content of many of James' percepts.

His manner of responding to the more emotion arousing stimuli evidences repression of affect and attempts to maintain control of his responsiveness through distancing the emotional component. When this is successful, James is able, through introspection and intellectualization, to deal with his emotions in his own time and as he feels capable of addressing them. When this is not successful, there is a breakdown of his controls and rather impulsive, irrational behavior with poor judgment and lability may emerge.

Finally, there are, throughout James' material, indications of the process of change and maturity taking place. There are signs of immaturity, fear of "growing up", as well as anxiety and a lack of closeness in relationships. At the same time, there are indications of empathy with

others, of concern and sensitivity to the opinions of others, and of a greater psychological interest and involvement in interpersonal rather than impersonal events and issues. James' responses reflect his attempts to develop more adequate defense mechanisms than he has had in the past. His use of communication as a means of affecting goals is also indicative of the maturation process and of his willingness to be cognizant of and attentive to the wishes and ideas of others.

*Clinical Impressions*

James E. Hitchcock is a 26 year old male of average intellectual abilities who evidences a great deal of inner tension and anxiety, unmet affectional needs, and repressive defense mechanisms. However, there are also strong indications of an ongoing process wherein he is developing more mature interpersonal behaviors and more adequate defense mechanisms.

The sixth of a sibling group of seven, James was born in Arkansas to a couple who were sharecroppers. The family was apparently extremely poor, moved frequently with the crops, and his parents and two oldest siblings had little or no formal education. None of the children went beyond the seventh grade. His father died of cancer when James was seven years old and his mother, who is epileptic, attempted to raise the five children still at home by herself. She remarried approximately six years later. James' stepfather was, reportedly, a good worker when they first married and drank only on weekends. However, over the next three years, he became a total alcoholic and was later hospitalized as a result. According to James, his stepfather was physically abusive toward his mother and verbally abusive toward the children.

All of the children left home at early ages, James at 13 years. From then until he was 17, he moved back and forth among his relatives staying with each from two weeks to six or eight months. At 17 years of age



he was arrested for five burglaries all committed at the same time. He stated that he and another young man were drinking and they went in and out of the back doors of a row of business establishments, including a Sears Roebuck store and the local power company. This occurred approximately ten miles from his hometown. James spent 18 months in prison and then came to Florida, again living first with one brother, then the other, then a girlfriend, and finally a brother again—his longest residence being the six months he spent with his girlfriend.

He stated that he began the use of alcohol at age 16, drank for about six months and, since then has had only an occasional beer as he becomes drunk on four. Aside from some experimentation, his use of drugs has been confined to marijuana and that only sporadically.

As described by James, his childhood was spent in an environment—both home and community—that was forced to concentrate on work and bare survival with little time or energy left over for affection, family activities, etc. His memories of his father are very few but fairly good. He was excluded from much knowledge of or any participation in his father's illness and death.

He related that his mother was not affectionate but that he knows that she loved him by the things that she did for him; e.g., she worked, took care of the children, put him in school, and took care of him when he was hurt. His mother's seizures frightened him and he said that he would generally leave the house when she had one for fear that his sister would ask him to help with his mother. He disliked his stepfather because of his abuse of his mother and, on one occasion, hit him with a hammer when he threatened to strike his mother. After doing this, he ran away and did not return home until he was told that he had no seriously injured his stepfather.

James' pattern of coping, beginning when he was quite small, was to retreat and escape. When he could not see his father or accompany his parents to the hospital for his father's treatments, he would passively go off by himself, or with his dog, and go fishing, play in the woods, etc. He would withdraw from his mother's seizures, ran away after the altercation with his stepfather, and eventually left home to get away from the increasing violence. There are also indications from his history that he began to develop repression as a coping mechanism very early in life. On the one hand, he relates a life of poverty, hard work, enough to eat but "short on clothes", seldom any spending money except what he earned himself, and being quite shy around other people. On the other hand, he describes going through his childhood in an "unconscious" manner, day in and day out, just having fun, wrestling with his dog, playing with other kids, etc.

These two accounts are inconsistent and suggest that he was beginning to handle unpleasant feelings by "tuning them out" and by running away from them—internally and externally.

When asked the reason for his constant moving, James' response was that it was job related, that he would run out of work or get bored which he did whenever he had learned the job. This is probably true, at least superficially, as James freely admits that he had never liked to work and only did so enough to be able to support himself. But that explanation is not enough to account for *that* many moves in *that* length of time.

More likely, judging from his test and interview material, James would begin to develop some feelings of affection, dependency, etc., for the family or relatives with whom he was staying. This would be something he wanted and needed very much yet would be very scarey for him, thus creating anxiety and conflict within him. As was his pattern, he would repress the anxiety as long as he could



and, when that was no longer effective, he would impulsively—and probably in an irrational and completely unorganized manner—escape from the scene, thereby quieting his anxiety and fears of rejection until the next time.

Although James initially confessed to the homicide on August 31, 1976, and then later denied it, only he and his brother Richard actually know at this point what truly happened. Certainly, such an act on James' part, or anyone else's, can never be completely ruled out. By the same token, it is an act that would be incongruent with his behavior pattern up to that point in his life and incongruent with the coping mechanisms which he had developed over the years beginning in childhood.

One must also question why James had ingested so much alcohol earlier that evening—a fact that has reportedly been verified by witnesses. That was not his usual drinking pattern. However, in view of his dynamics and the reduced inhibitions which would have resulted from his intoxification, the sexual involvement with his brother's stepdaughter was not surprising, as his unmet affectional needs would very easily have become a rather crude need for sexual relations and might well have been expressed in a disorganized manner reflecting extremely poor judgment. But, upon discovery, one would predict given his dynamics that James' reaction would have been to have left town on the first bus out, heading in *any* direction.

During the six years that he had been on Death Row, James has utilized his time—at least during the past three years—quite productively. He has obtained his GED which, in that particular circumstance, requires considerable patience, perserverance, initiative, and self-reliance, since inmates cannot go out to classes and all the material is, therefore, self taught.

His ability to be introspective, combined with an increased social awareness, has resulted in a great deal of under-

standing of himself, his history, and his own dynamics. He has also put this to use to assist him in understanding others—both the other inmates and the correctional officers. Thus, he is able to empathize with others and appreciate their points of view. Along with this, he has developed his ability to communicate as a means of obtaining his goals rather than utilizing manipulation or aggression, as is more frequently observed in a prison setting.

*Conclusions*

James does not, in many respects, fit the more typical picture of those who commit violent acts against other individuals. His family, although very poor, was not physically abusive and the emotional neglect he experienced was more a function of ignorance and the circumstances than a function of intent. He does not evidence the same degree of immaturity, of strong drives toward immediate gratification, of impulsive acting out of emotions, or of hostility and aggression. His history is less one of antisocial behavior then it is one of a marginal lifestyle of "getting by" and staying "uninvolved" with others due to his own anxiety and fear of rejection. Even that level of anxiety and concern about the opinions and feelings or others is atypical of this population.

If James' sentence were commuted and he were to be in "population", there is every reason to believe that not only would he function well but he would be a positive influence. He has the ability to act in the role of an arbitrator and could probably assist in defusing situations that arise between inmates and staff and/or among inmates. Also, he is bright and he has comprehended and retained considerable information from reading and from watching educational television. He would be able to handle any assignment such as the library, legal aide, etc. well.

Should this occur, James should also have the opportunity of being involved in individual psychotherapy. Again, he



is bright, articulate, capable of insight—all the characteristics which make one a good candidate for traditional psychotherapy. Although he had gained much on his own, he now needs competent assistance to help him confront and deal with those aspects of his personality that are most scarey and anxiety-provoking for him—the issues of affection and dependency that he is most likely to avoid facing—and help him to integrate and consolidate the progress he has already made.

/s/ Elizabeth A. McMahon, Ph.D.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

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[Title Omitted in Printing]

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**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR AN EVIDENTIARY HEARING**

*Introduction*

Petitioner, JAMES ERNEST HITCHCOCK, submits this memorandum of law in support of his motion for an evidentiary hearing with respect to the grounds set forth at paragraphs 19B(4) and 19G(2) of his amended petition for a writ of habeas corpus.

The only issue to be decided by the Court with respect to the instant motion is whether the Court is required to grant an evidentiary hearing, and, if the Court determines that it is not required to grant an evidentiary hearing, whether it will nonetheless exercise its discretion to hold such a hearing. The principles which guide the determination as to whether a hearing must be held are discussed in *Townsend v. Sain*, 372 U.S. 293 (1963). Preliminarily in *Townsend*, the Court held, at 312, that

> "where an applicant for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, the federal court to which the application is made has the power to receive evidence and try the facts anew."

The Court thereafter discussed "the considerations which in certain cases may make exercise of that power mandatory," *id.*, and further held that

> "[w]here the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and



> fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding."

*Id.* Because this test could be "too general . . . to explain the controlling criteria for the guidance of the federal habeas corpus courts," *id.* at 313, however, the Court determined that "[s]ome particularization may therefore be useful." *Id.* Accordingly, the Court held that

> "a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing."

*Id.*

After determining whether an evidentiary hearing is mandatory with respect to the two evidentiary-based claims raised by Petitioner, the Court will then be guided by the provision of 28 U.S.C. § 2254(d). Although this section of the habeas corpus statute to some extent "codified" the six *Townsend* criteria, the statute does not supersede *Townsend*, but still leaves to the *Townsend* criteria the role of guiding the threshold determination of whether a hearing must be held. *Guice v. Fortenberry*, 661 F.2d 496 (5th Cir. 1981) (en banc). If the Court decides that *Townsend* mandates a hearing, "section (d) allocates the burdens of proof" in such a hearing.[1]

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[1] If the hearing is mandatory, then one of the criteria listed in 2254(d) will ordinarily have been met, and the Petitioner will then proceed under the normal proponderance of the evidence standard,

*Thomas v. Zant*, 697 F.2d 977, 984 (11th Cir. 1983). If, on the other hand, the Court decides that *Townsend* does not mandate a hearing, the Court may nonetheless exercise its discretion to hold a hearing. *Townsend*, 372 U.S. at 318. In this event, 2254(d) would again play the "allocation of proof" role described in n. 1, *supra*.

Within this legal framework, Petitioner submits, in relation to the claims asserted in paragraphs 19B(4) and 19G(2) of the petition, (1) that he has "allege[d] facts which, if proved, would entitle him to relief," *Townsend*, 372 U.S. at 312; (2) that an evidentiary hearing is mandatory because "the merits of the factual dispute were not resolved in the state hearing[,] . . . that state factual determination is not fairly supported by the record as a whole[,] . . . [and] the material facts were not adequately developed at the state-court hearing . . .," *Townsend*, 372 U.S. at 313; and (3) in the alternative, if the Court determines that an evidentiary hearing is not mandatory, that an evidentiary hearing should nonetheless be held in order to provide Petitioner an opportunity to show "by convincing evidence that the factual determination by the state court was erroneous," 28 U.S.C. § 2254(d).

## ARGUMENT

### I. PETITIONER HAS ALLEGED FACTS WHICH, IF PROVED, WOULD ENTITLE HIM TO RELIEF

In setting forth his claims in paragraph 19B(4) and 19G(2) of the amended petition for a writ of habeas corpus, Petitioner has sufficiently stated his claims: he has alleged facts which, if proved, would entitle him to relief. The legal basis for each of these claims has been discussed in some detail in the memorandum previously

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without having to rebut any presumption that the state court fact findings were correct. If, on the other hand, none of the criteria listed in 2254(d) is met, the Petitioner must then proceed under the burden of establishing "by convincing evidence that the factual determination by the State court was erroneous."



filed by Petitioner in support of his application for a stay of execution and will not be duplicated here. *See*, pp. 28-29, 52-55 of the memorandum in support of a stay. Incorporating the argument from that memorandum by reference, Petitioner submits that the following summary of the legal basis for each claim demonstrates that each claim is legally sufficient to require relief.

The claim asserted in ¶ 19B(4) turns upon two operative principles of law and/or fact. First, the available evidence of relevant, nonstatutory mitigating circumstances was not fully presented to the jury and the judge in Petitioner's sentencing trial. Critical mitigating evidence of Mr. Hitchcock's character, including his potential for rehabilitation, was omitted. And critical mitigating evidence of the possibility that Mr. Hitchcock did not commit the offense (giving rise to doubt about guilt which may not meet the standard of "reasonable doubt," but which nonetheless is sufficiently present to mitigate punishment) was omitted. This non-presentation, and consequent non-consideration, of relevant mitigating evidence implicates the Eighth Amendment, for the Eighth Amendment is concerned that "the sentencer . . . not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character, record or circumstance of the offense . . . ." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis in original).

This implication of the Eighth Amendment leads to the second operative principle underlying this claim: that the death penalty statute operated to produce this result (i.e., the non-presentation and non-consideration of relevant mitigating evidence). As discussed in detail at pp. 32-36 of the stay memorandum, at the time of Petitioner's trial, the death penalty statute, as construed by the Florida Supreme Court, reasonably appeared to limit the jury's and judge's consideration of mitigating circumstances to the factors enumerated in the statute. *See*, *Cooper v. State*, 336 So.2d 1133, 1139 (Fla. 1976). In accordance with this provision of the law, Petitioner's

trial counsel believed that he could not affirmatively present and argue evidence of *nonstatutory* mitigating factors. He tried Petitioner's case in accord with this belief and, as a result, did not investigate or present evidence of available nonstatutory mitigating factors. The result was precisely the same as if the statute had explicitly and unambiguously precluded consideration of nonstatutory mitigating factors: Petitioner's sentencing proceeding violated the Eighth Amendment. *Lockett v. Ohio, supra*, 438 U.S. at 608.[2] The operation of the statute as well denied the effective assistance of counsel in the manner condemned in *Brooks v. Tennessee*, 406 U.S. 605 (1972), and *Geders v. United States*, 425 U.S. 80 (1976). *Cf., United States v. DeCoster*, 624 F.2d 196, 201 (D.C. 1979) (en banc).[3]

The claim asserted in ¶ 19G(2) likewise sufficiently states a claim for relief. In this paragraph, Mr. Hitchcock contends that despite the Eighth Amendment's requirement that sentencing discretion be suitably directed and limited, *Gregg v. Georgia*, 428 U.S. 153, 189 (1976), and the Florida death penalty statute's attempt to comply with that mandate through the use of an exclusive list

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[2] "To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors." *Id.*

[3] Although Petitioner believes that counsel was "ineffective" only because the death penalty statute reasonably appeared to preclude the consideration of nonstatutory mitigating factors, if this Court were to find that counsel was *not* reasonable in this perception of Florida law, then his allegation of ineffective assistance in ¶ 19B(4) would necessarily require the more traditional analysis of counsel's "competency" in representing him. *See, Washington v. Strickland*, 693 F.2d 1243 (5th Cir. 1982) (en banc). Under this alternative theory, however, a claim would also be stated, for counsel's failure to investigate would be ineffective and prejudicial under *Washington*—since the failure to investigate was for no tactical reason and the evidence not presented created a substantial disadvantage to Petitioner, by precluding the sentencer's consideration of clearly the most persuasive mitigating evidence available to Petitioner.



of aggravating circumstances, *Purdy v. State*, 343 So.2d 4, 6 (Fla. 1977), the death penalty is still imposed in Florida for reasons *other than* those aggravating circumstances. He contends that death sentences are still imposed in Florida, for example, because the capital defendant by chance committed his or her homicide in one county instead of another, because the defendant is a man instead of a woman, because the victim held a job in a skilled or professional occupation instead of an unskilled occupation, or because the victim was a white person instead of a black person. If he were able to prove that factors such as these have played a determinative role in the decision to impose the death sentence in Florida, Mr. Hitchcock submits that he could establish a violation of *Furman v. Georgia*, 408 U.S. 238 (1972). With such proof, he could show that the attempted guidance of capital sentencing discretion, through the use of a discrete number of " 'clear and objective standards,' " *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980), has been futile—that the Florida death penalty statute has "simply papered over the problem of unguided and unchecked jury discretion," *Woodson v. North Carolina*, 428 U.S. 280, 302 (1976), and that death sentences have continued to be imposed on the basis of factors that the sentencer, on an *ad hoc* basis and on the basis of conventional wisdom, has deemed appropriate. In short, he could show that the Florida death penalty statute has "fail[ed] adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman*" has occurred. *Gregg v. Georgia, supra*, 428 U.S. at 195 n.46.

Accordingly, in both paragraphs 19B(4) and 19G(2), Mr. Hitchcock has met the first requirement for obtaining an evidentiary hearing: he has alleged facts which, if proved, would entitle him to relief.

## II. AN EVIDENTIARY HEARING IS MANDATORY UNDER THE CIRCUMSTANCES OF PETITIONER'S CASE

Petitioner submits that he is entitled to an evidentiary hearing under *Townsend v. Sain, supra,* because he did not receive a full and fair evidentiary hearing in the state courts with respect to either claim for which he now seeks a hearing. Specifically, *Townsend's* circumstances (1), (2), and (5) require a hearing on the claim asserted in ¶ 19B(4), and the lack of any hearing in state court requires a hearing on the claim asserted in ¶ 19G(2).

### A. *The non-presentation of mitigating circumstances claim [¶19B(4)] requires a hearing because the state courts refused to hear all the evidence essential to its determination.*

When this claim was presented to the trial court in Mr. Hitchcock's Rule 3.850 motion, the trial court denied an evidentiary hearing and made no relevant fact-findings. On appeal, the Florida Supreme Court affirmed the trial court's disposition of the claim without a hearing, reasoning as follows:

> "We agree with the state that the first claim, i.e., that the operation of law rendered Hitchcock's trial counsel ineffective, is a deprivation of due process claim scantily clothed as ineffective assistance of counsel.[2] On direct appeal, Hitchcock's counsel argued that presentation and consideration of mitigating evidence had been improperly limited and cited both *Lockett v. Ohio,* 438 U.S. 586 (1978), and *Cooper v. State,* 336 So.2d 1133 (Fla. 1976), *cert. denied,* 431 U.S. 925 (1977). In response the state relied on *Songer v. State,* 365 So.2d 696 (Fla. 1978), *cert. denied,* 441 U.S. 956 (1979). Hitchcock's witness at sentencing testified to Hitchcock's past life



> and behavior, and trial counsel argued this evidence to the jury. The record conclusively demonstrates, therefore, that the limitation on mitigating evidence issue has been raised previously, has been fully considered, and has been found to be without merit. We now find nothing to indicate that Hitchcock's counsel was ineffective and hold that the test set out in *Knight v. State,* 394 So.2d 997 (Fla. 1981), has not been met. We further reiterate that the death penalty was constitutionally imposed in this case."

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"[2] Although Hitchcock attempts to make his first issue cognizable through a nebulous due process/effectiveness of counsel claim, that claim is in reality no different from the one advanced in *Armstrong v. State,* No. 61,871 (Fla. Jan. 10, 1983), where we stated:

> Appellant contends that the capital felony sentencing law in effect at the time of the trial and the instructions to the jury regarding sentencing improperly limited mitigating considerations to the circumstances listed in the statute in violation of *Lockett v. Ohio,* 438 U.S. 586 (1978). This issue, like the others already mentioned, could have been raised on direct appeal and therefore is not a proper subject for collateral attack of appellant's sentence.

*Id.* slip op. at 3. Hitchcock's attempt to distinguish *Armstrong* is unavailing because the instant claim boils down to merely another *Lockett* challenge."

*Hitchcock v. State,* —— So.2d ——, No. 63,667 (Fla., May 17, 1983) (slip opinion, 2-3). By its reference to Mr. Hitchcock's having raised "the limitation on mitigating evidence issue" on direct appeal, the Florida Supreme Court made relevant its disposition of that issue on direct appeal, which was as follows:

> "Hitchcock next claims that section 921.141 unconstitutionally limits the consideration of mitigating factors and that he was improperly limited in presenting mitigating evidence. Again, we find no merit to these contentions. As stated in *Songer v.*

> *State*, 365 So.2d 696 (Fla. 1978), *cert. denied*, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979), 'all relevant circumstances may be considered in mitigation, and . . . the factors listed in the statute merely indicate the principal factors to be considered.' 365 So.2d at 700. After the jury returned its verdict, defense counsel asked for time to prepare for sentencing and was given a week for that purpose. At sentencing, however, defense presented only one witness. There is nothing in the record indicating that the trial judge limited the defense's presentation. Rather, it appears that the defense itself chose to limit that presentation."

*Hitchcock v. State*, 413 So.2d 741, 748 (Fla. 1982).

On the basis of the foregoing disposition of this issue by the Florida Supreme Court, Petitioner submits that he is entitled to an evidentiary hearing under *Townsend's* circumstances (1), or alternatively, under *Townsend's* circumstances (2) and (5). Circumsatnce (1) is that "the merits of the federal dispute were not resolved in the state hearing. . . ." 327 U.S. at 313. It is applicable where neither "express findings of fact have been made by the state court," nor has "the state court . . . impliedly found material facts." *Id.* It is squarely applicable here because the Florida Supreme Court made neither express nor implied findings of fact regarding the mitigating circumstances issue—the court made no findings of fact at all. By equating Mr. Hitchcock's claim with the claim raised in *Armstrong v. State*, *see* n.2 in the quotation from the *Hitchcock* 3.850 opinion, *supra*, the court treated Mr. Hitchcock's claim as simply an attack on the death penalty statute. By then equating Mr. Hitchcock's claim with his related claim on direct appeal—that the statute and jury instructions unconstitutionally limited the consideration of mitigating circumstances and that the judge limited the presentation of mitigating evidence—the court reconfirmed its fundamental misperception of, rather than fact finding against, Mr. Hitchcock's claim.



As presented in the Rule 3.850 proceeding, Mr. Hitchcock's claim *did not* re-attack the constitutionality of the death penalty statute, nor the rulings of the trial judge. The claim attacked the sentencing process *in his particular case*—through which Mr. Hitchcock's *lawyer* did not investigate or present certain mitigating evidence because he believed that the law prevented the presentation of that evidence. As thus framed, the death penalty statute could still be held constitutional under this claim, even though its particular application in Petitioner's case was unconstitutional. *Compare*, *Jacobs v. State*, 396 So. 2d 713, 718 (Fla. 1981), and *Perry v. State*, 395 So. 2d 170, 174 (Fla. 1981), in which the court recognized and reversed death sentences because of an analogous "misrepresentation" of the law by trial judges, who, relying upon *Cooper v. State*, *supra*, believed that the statute limited consideration of mitigating circumstances to only those specifically enumerated.[4] Ironically, the claim, based as it was upon the *defense lawyer's* perception of the law, went to the very question *left open to Petitioner* by the Florida Supreme Court's opinion on direct appeal. Following the court's rejection of Mr. Hitchcock's claim that the statute, the jury instructions, and the judge's rulings unconstitutionally limited the

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[4] *See also, Muhammad v. State*, 426 So.2d 533 (Fla. 1983), a case involving a pre-*Cooper* sentencing in which a claim was asserted that counsel was ineffective for failing to present nonstatutory mitigating evidence. There, the court found that counsel was not ineffective because he could not be "expected to predict the decision in *Lockett v. Ohio* [supra]." *Id.* at 538. This holding, of necessity, recognizes the reasonableness of reading Florida law as restricting the consideration of mitigating factors to only those in the statutes; and it implies that *Lockett* constituted a change in the law not retroactive in application) as it was being followed in Florida at the time. This is but further confirmation that the Florida Supreme Court has, in other cases, conceded that the death penalty statute could have been reasonably read by lawyers to limit the consideration of mitigating circumstances to those in the statute.

consideration of mitigating circumstances, the court recounted that

> "[a]fter the jury returned its verdict defense counsel asked for time to prepare for sentencing and was given a week for that purpose. At sentencing, however, defense presented only one witness. There is nothing in the record indicating that the trial judge limited the defense's presentation. *Rather, it appears that the defense itself chose to limit that presentation.*"

*Hitchcock v. State, supra,* 413 So.2d at 748 (emphasis supplied). This claim speaks precisely to why the "defense itself chose to limit [the] presentation" of mitigating circumstances—a claim which was in no way addressed on direct appeal. Accordingly, because the Florida Supreme Court mischaracterized Petitioner's mitigating circumstance claim as one previously decided, the state courts made no findings of fact respecting the claim, and an evidentiary hearing is required.

While Petitioner submits that the only rational reading of the Florida Supreme Court's Rule 3.850 opinion requires an evidentiary hearing for the foregoing reasons, the opinon does contain a sentence which could conceivably be construed as a finding of fact against this claim. At pages 2-3 of the slip opinion, *supra,* the court recited the following facts from the trial record: "Hitchcock's witness at sentencing testified to Hitchcock's past life and behavior, and trial counsel argued this evidence to the jury." This sentence might be construed as an implied finding of fact that Petitioner's trial counsel did not believe that he was limited to the statutory mitigating circumstances since, arguably, evidence of "past life and behavior" could be evidence of nonstatutory mitigating circumstances. It should not be construed as such an implied finding of fact, however, for as analyzed, *supra,* the Florida Supreme Court clearly held that the claim was identical to the claim concerning the "limitation on mitigating evidence . . . raised previously [in the direct appeal]," slip opinion at 3, and that it was "in reality no different from" an attack on the statute as limiting the consideration of mitigating circumstances, slip opinion at 2 n.2. Having characterized the claim in this fashion, the court's reference to the testimony presented at sentencing must be taken as a mere recitation of historical fact—rather than as a finding of fact that counsel did not operate under the belief that the presentation of mitigating evidence was limited to statutory mitigating circumstances—since the claim as characterized *did not* subsume the claim as presented.



Notwithstanding, even if this sentence were taken out of context and construed as a finding of fact, Petitioner would nonetheless be entitled to an evidentiary hearing on the mitigating circumstance claim because of two other factors identified in *Townsend.* If the Rule 3.850 appeal to the Florida Supreme Court is deemed the equivalent of a state evidentiary hearing—as it must be where the appellate court makes "factual determinations . . . after a review of the trial record," *Sumner v. Mata,* 449 U.S. 539, 546 (1981)—this finding of fact as a result of that hearing "is not fairly supported by the record as a whole." *Townsend v. Sain, supra,* 372 U.S. at 313. The only evidence in the record which could support a finding that counsel did not believe his presentation of mitigating evidence was limited to statutory mitigating circumstances is the fact that counsel presented some testimony briefly describing Mr. Hitchcock's growing up in a family with seven children, where the parents picked cotton and the father died of cancer when Mr. Hitchcock was seven years old (Penalty Trial Transcript, 8-9). The remainder of the only mitigating witness's testimony concerned the statutory "psychological" mitigating circumstances (*id.,* 7-8). Even these minute references to Mr. Hitchcock's early life, however, were presented very narrowly, without any of the facts about the extreme poverty experienced by the Hitchcock family

or of the extraordinary emotional toll taken on Mr. Hitchcock by these two narrowly-demonstrated biographical facts. Moreover, counsel did not argue these—or the mitigating facts concerning Mr. Hitchcock's non-violent character which had been presented as relevant to the question of guilt in the guilt phase of the trial (Trial Transcript, 737, 739, 744, 747, 749)—during the penalty phase arguments. Counsel simply reminded the jury of these facts for "whatever purposes you may deem appropriate." (Penalty Trial Transcript, 14). Instead, counsel argued only the statutory mitigating factors as mitigating against death (*id.*, 21-25). Thus, to the extent that the "record as a whole" addresses this issue at all, the record is wholly inconclusive. Moreover, to the extent that it supports any finding as to this issue at all, it tends to support the facts as asserted by Mr. Hitchcock—that counsel operated under the belief that his presentation and argument of mitigating circumstances had to be confined to the statutory factors. Where the record is thus "carefully scrutinize[d]" with the "exacting" attention required by the Supreme Court, *Townsend*, 372 U.S. at 316, the record unquestionably *does not fairly* support the only conceivable finding made by the Florida Supreme Court. *Compare, Thomas v. Estelle*, 582 F.2d 939, 942 (5th Cir. 1978).

Finally, if the Rule 3.850 appeal is deemed the equivalent of a hearing, any finding of fact made therein is unreliable, and a new hearing is required, because "the material facts were not adequately developed at [that] . . . hearing" for a "reason not attributable to the inexcusable neglect of Petitioner." *Townsend v. Sain, supra*, 372 U.S. at 313, 317. Unquestionably, the facts not only material but critical to the determination of this issue were the facts Mr. Hitchcock sought to prove by the testimony of trial counsel and various witnesses who could have presented evidence of nonstatutory mitigating circumstances. *See*, the accompanying motion for an



evidentiary hearing. These facts were not presented because the state courts refused to permit their presentation when Petitioner timely proffered the facts at the first legally available opportunity. Thus, the inadequate development of material facts was in no way "attributable to the inexcusable neglect of Petitioner." Accordingly, *Townsend*, as well as the Eleventh Circuit's recent decision in *Thomas v. Zant*, 697 F.2d 977 (11th Cir. 1983), require a *de novo* evidentiary hearing for this reason alone.

As the foregoing discussion demonstrates, therefore, Mr. Hitchcock did not "receive a full and fair evidentiary hearing in a state court," *Townsend*, 372 U.S. at 312, with respect to his ¶ 19B(4) claim, so this Court must provide such a hearing.

B. *The arbitrary application of the death penalty claim [¶ 19G(2)] requires a hearing, because no hearing was held with respect to this claim.*

Unlike the claim asserted in ¶ 19B(4), upon which the equivalent of an evidentiary hearing was held in the Florida Supreme Court, the claim asserted in ¶ 19G(2) was not given any evidentiary consideration at all. The claim was deemed properly denied by the trial court because it failed to state a claim under Florida law. Specifically, the Florida Supreme Court held Mr. Hitchcock's factual allegations, even if true, "did not constitute a sufficient preliminary basis to state a cognizable claim." *Hitchcock v. State, supra*, —— So.2d at —— (slip opinion at 3). Accordingly, *Townsend v. Sain, supra*, requires an evidentiary hearing on this issue, for there has never been an evidentiary hearing at all, much less a "full and fair evidentiary hearing," after which "the state-court trier of fact . . . has reliably found the relevant facts," 372 U.S. at 312-313. And in this circuit, "a district court must hold an evidentiary hearing and determine the relevant facts when [as here] the state

court has failed to [hold] a hearing." *Jackson v. Estelle*, 570 F.2d 546, 547 (5th Cir. 1978). *Accord, Thomas v. Estelle*, 587 F.2d 695, 697 (5th Cir. 1979); *Mason v. Balcom*, 531 F.2d 717, 722 (5th Cir. 1976).

## III. EVEN IF THE COURT DETERMINES THAT A HEARING IS NOT MANDATORY, THE COURT SHOULD NONETHELESS EXERCISE ITS BROAD DISCRETION TO HOLD SUCH A HEARING

While Petitioner firmly believes that an evidentiary hearing is required on both of the issues specified, if the Court should rule against Petitioner in this regard, Petitioner urges the Court nonetheless to exercise its discretion to hold a full evidentiary hearing as requested in Petitioner's accompanying motion. The reasons for such an exercise of discretion are manifest.

In *Townsend v. Sain, supra,* the Supreme Court held that "where an applicant for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, the federal court to which the application is made has the *power* to receive evidence and try the facts anew." *Id.* at 312 (emphasis supplied). Time and time again, the *Townsend* court emphasized that the district court's "power" and "discretion" to hold a hearing applies "[i]n all . . . cases" and "[in] every case" in which a factual dispute exists. *Id.* at 318. The only limit the Court has placed on the "sound discretion" of the federal district courts in this regard is that a hearing not be held on a claim that is "frivolous," *Id.*[5]

In enacting 28 U.S.C. § 2254(d) in 1966, and in approving the Rules Governing § 2254 Cases in 1977, Congress clearly reaffirmed *Townsend's* recognition of the federal courts' broad discretion to hold evidentiary hear-

[5] *Accord, Blackledge v. Allison*, 431 U.S. 63, 76 (1977) (federal court has discretion to invoke habeas corpus fact-finding procedures whenever a claim raised is not "palpably incredible" or "patently frivolous or false").



ings in habeas corpus cases. Thus, the concluding sentence in section 2254(d) establishes the burden of proof in situations in which a discretionary "evidentiary hearing" is held "in the Federal court," under circumstances in which there is no mandatory duty to hold such a hearing. If Congress did not contemplate that discretionary hearings would frequently be held, it hardly would have wasted any effort on establishing procedures for such hearings. *See, In re Wainwright*, 678 F.2d 951, 953 (11th Cir. 1982).

Likewise, in 1977, Congress left Proposed Rule 8 of the Rules Governing § 2254 Cases intact, thereby affirming the Advisory Committee's statement that the holding of an evidentiary hearing, if not mandatory, is in the "discretion of the district judge," and the Advisory Committee's express assumption that such hearings will be held under Rule 8 in the "majority" of cases in which a nonfrivolous factual issue is raised. Advisory Committee's Note to Habeas Rules 7 and 8.

This "sound discretion" to hold a hearing is particularly appropriate in Mr. Hitchcock's case for three reasons. First, because he is sentenced to die, this is probably Mr. Hitchcock's final opportunity to adduce evidence demonstrating the unconstitutionality of the procedures that resulted in his sentence of death. Because evidentiary hearings in federal habeas corpus proceedings have been recognized as an important means of assuring the reliability of judicial determinations, *see, e.g., United States ex rel. Griffin v. Vincent*, 359 F.Supp. 1072, 1073 (S.D.N.Y. 1973), and because the overriding concern in death cases is for reliability in the "determination that death is the appropriate punishment in a specific case," *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976), an evidentiary hearing should be held whenever, as in this case, it may shed any light on the fairness of the procedures leading to, or the constitutional validity of, a sentence of death. Second, the issue of whether a hearing is mandatory is, at the very least, a close question, and

for this reason alone, other courts have chosen to hold hearings. *See, e.g., United States ex rel. Mangiaracina v. Case*, 439 F.Supp. 913 (E.D.Pa. 1977), *aff'd*, 577 F.2d 730 (3d Cir. 1973); *United States ex rel. Clayton v. Mancusi*, 326 F.Supp. 1366 (E.D.N.Y. 1971), *aff'd*, 454 F.2d 454 (2d Cir.), *cert. denied*, 406 U.S. 977 (1972). Finally, while the Court may determine that no hearing is necessary, the evidence which Petitioner seeks to present nonetheless leaves the "factual disputes seemingly unresolved in essential totality," warranting a hearing. *United States ex rel. Griffin v. Vincent, supra. See also, Rice v. Wolff*, 388 F.Supp. 185 (D.Neb. 1974), *aff'd*, 513 F.2d 1280 (8th Cir. 1975).

Accordingly, in the interests of justice, the Court should grant the requested evidentiary hearing.

## CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant the motion for an evidentiary hearing.

Respectfully submitted,

[Counsel's Name/Address Omitted in Printing]

[Certificate of Service Omitted in Printing]



UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

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No. 83-357-Civ-Orl-11

JAMES ERNEST HITCHCOCK, PETITIONER

*vs.*

LOUIE L. WAINWRIGHT, ETC., RESPONDENT

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**ORDER**

On 17 June 1983, this cause came on for hearing on several motions by both parties. Petitioner's request in his motion for discovery is denied as to taking depositions of members, past and present, of the Florida Supreme Court. As to other discovery requests and requests for fees for witnesses and other discovery expenses, Petitioner is ordered to submit the following for later ruling in accordance with the Criminal Justice Act, 18 U.S.C. § 3006A:

(a) A proffer of what testimony is expected and its relevance;

(b) Specific dollar amounts requested per witness or item.

It is FURTHER ORDERED that Respondent need not file a response to the amended petition until ten days after this court's ruling on Respondent's motion to dismiss.

DONE AND ORDERED in Chambers at Orlando, Florida, this 21st day of June, 1983.

/s/ John A. Reed
JOHN A. REED
Judge

[Notification of Distribution Omitted in Printing]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

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No. 83-357-Civ-Orl-11

JAMES ERNEST HITCHCOCK, PETITIONER

*vs.*

LOUIE L. WAINWRIGHT, ETC., RESPONDENT

---

**ORDER**

For the reasons set forth in the *Memorandum of Decision* filed on even date herewith the court finds that an evidentiary hearing and further oral argument are unnecessary. Pursuant to Rule 4 of the *Rules Governing Section 2254 Cases in the United States District Courts*, the *Amended Petition for Writ of Habeas Corpus* filed herein on 9 June 1983 is hereby dismissed.

FURTHER ORDERED that the stay of execution ordered by this court on 17 May 1983 shall terminate at 12:00 o'clock noon on 17 October 1983.

The Clerk of this court shall mail by certified mail a copy of this order and the *Memorandum of Decision* to the Petitioner, his attorneys, and the attorneys for Respondent. The Clerk of this Court shall also provide telephone notice of this order to the Clerk of the United States Court of Appeals for the Eleventh Circuit and shall thereafter mail to said Clerk by certified mail a copy of this order and the *Memorandum of Decision.*

DONE AND ORDERED in Chambers at Orlando, Florida, this 22nd day of September, 1983.

/s/ John A. Reed, Jr.
JOHN A. REED, JR.
Judge

[Notification of Distribution Omitted in Printing]



UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

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No. 83-357-Civ-Orl-11

JAMES ERNEST HITCHCOCK, PETITIONER

*vs.*

LOUIE L. WAINWRIGHT, ETC., RESPONDENT

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**MEMORANDUM OF DECISION**

James Ernest Hitchcock filed a *Petition* for a writ of Habeas Corpus on 13 May 1983 and thereafter filed an *Amended Petition* for a Writ of Habeas Corpus on 9 June 1983. On 31 May 1983, Respondent filed a *Motion to Dismiss.* On 17 June 1983, the *Motion to Dismiss* was argued and treated by the court and the parties as having been directed to the *Amended Petition.* The court has reviewed the *Amended Petition* against the *Motion to Dismiss* and, as contemplated by Rule 4 of the *Rules Governing Section 2254 Cases in the United States District Courts*, has independently reviewed the *Amended Petition* for arguable merit. The court has included in its review of the *Amended Petition* the entire state court trial record. The record was filed by the Respondent and is referred to at length in the *Amended Petition.* On the basis of its review, the court has concluded that the *Amended Petition* for habeas corpus relief lacks arguable merit.

The first ground asserted by the Petitioner is that the evidence was insufficient to support the felony murder theory. The pertinent homicide statute is § 782.04(1)(a), *Fla. Stat.* (1975). It provided: "The unlawful killing of a human being . . . when committed by a person engaged in the perpetration of . . . any . . . involuntary

sexual battery . . . shall be murder in the first degree and shall constitute a capital felony . . .". The pertinent statute defining sexual battery is § 794.011, *Fla. Stat.* (1975). It provided:

> A person who commits sexual battery upon a person over the age of eleven years, without that person's consent, and in the process thereof . . . uses actual physical force likely to cause serious personal injury shall be guilty of a life felony . . .

The statute defines the phrase "serious personal injury" as "*great bodily harm or pain*, permanent disability, or permanent disfigurement." (Emphasis added).

The relationship which must exist between the homicide and the underlying felony has been established by opinions in *Jefferson v. State*, 128 So.2d 132 (Fla. 1961), and *Campbell v. State*, 227 So.2d 873 (Fla. 1969). In those cases, the court held that even if the underlying felony had been technically completed when the murder occurred, the felony murder statute would still apply, if the homicide was closely associated in point of time with the underlying felony and was committed as a means of escaping detection.

For purposes of a habeas challenge to the sufficiency of the evidence, the test is whether or not on the evidence adduced any rational trier of fact could have found beyond reasonable doubt the establishment of guilt. *Jackson v. Virginia*, 443 U.S. 307, 324 (1979). The Petitioner claims that the evidence was insufficient to support the finding of guilt on the theory of felony murder because the evidence was insufficient to establish the Petitioner utilized physical force likely to cause serious personal injury.

The Petitioner's confession which was introduced in evidence as a part of the state's case in chief contains an admission by the Petitioner that early in the morning of 31 July 1976 he entered the bedroom of his brother's thirteen year old stepdaughter and had sexual intercourse



with her. Following this, according to the Petitioner's own confession, she stated that she was hurt and desired to tell her mother. The Petitioner admitted in his confession that he struck her and carried her from the house, choked her to death and hid her body. Testimony presented also in the state's case in chief by Guillermo Ruiz, the medical examiner for Orange County, established that the victim had abrasions on her neck and also had evidence of trauma to her left eye and laceration around her left eye. Dr. Ruiz also testified that the girl's hymen had been lacerated within twenty-four hours before her death and that hair and sperm were found in her vagina.

The age of the victim, the fact that she was of previously chaste character, her insistence on telling her mother and the Petitioner's admission as to the time of the occurrence could have led a reasonable jury to the conclusion that the sexual relationship was not consensual. The same evidence also suggests that physical force likely to cause great bodily harm was utilized. It was the victim's specific statement that she was hurt and desired to tell her mother that led to the violence within the house and the choking which occurred outside. The evidence established through the medical examiner and through the confession of the Petitioner could have convinced a rational jury that "serious personal injury", as defined in Florida law, was inflicted on the victim.

The second ground for habeas relief relates to a reservation of ruling by the trial judge on the motion for judgment of acquittal made at the close of the state's case in chief. At that time, the trial judge denied the motion for judgment of acquittal on the state's theory of premeditated murder, but reserved ruling on the motion as it related to the felony murder theory (T. 719). The Petitioner asserts that this shifted the burden of proof and denied effective assistance of counsel.

It was error for the trial court to have reserved ruling on any aspect of the motion for judgment of acquittal. *Hitchcock v. State*, 413 So.2d 741 (Fla. 1982), *cert. de-*

*nied*, —— U.S. ——, 74 L.Ed.2d 213 (1982). The Florida Supreme Court, however, in the direct appeal in this case concluded that the error was harmless. This court's review of the record leads it to the same conclusion. As mentioned above, there was adequate evidence to take the case to the jury on the felony murder theory. The Petitioner's defense counsel anticipated the possibility that the motion would be denied and presented testimony dealing with the consensual nature of the sexual relations between the Petitioner and the victim. Furthermore, there is nothing in the record to suggest that the defense counsel's strategy was adversely affected by the court's ruling.

The third ground asserts that the trial court kept out nearly all of the evidence proffered by the Petitioner in support of his defense. Petitioner's defense was that his brother Richard had killed the victim. To support his theory, the Petitioner tried to show that his brother Richard had a reputation for violence whereas he, the Petitioner, treated young children well. The Petitioner also argues with respect to this ground that he was denied an opportunity "to show why he would have initially confessed . . . despite his innocence . . .".

The transcript of the testimony negates the validity of the third ground. Evidence of the Petitioner's character for nonviolence was repeatedly admitted through his own witnesses and to some extent through the testimony of his brother Richard and his sister-in-law (Richard's wife) Judy, both of whom were called as witnesses for the state.

Judy Hitchcock testified that in July 1976 the Petitioner was living in her home with her children and Richard. She testified she never saw the Petitioner hit or discipline any of the children (T. 267). Richard Hitchcock testified for the state that the Petitioner got along "all right" with the children.

Roy Carpenter, Sgt. Rick Dawes, Archie Sooter, Martha Hitchcock, James Hitchcock, Fay Hitchcock and Brenda



Reed were witnesses called by the Petitioner. Carpenter testified that on the day after the "incident" (meaning the day on which the victim's body was found) when he saw the Petitioner in Winter Garden, the Petitioner said he wanted to organize a search party to look for his niece. Carpenter testified he never knew the defendant to commit "violence" (T. 725). Sgt. Rick Dawes of the Winter Garden Police Department testified that the Petitioner came into the Winter Garden Police Department on 31 July 1976 and surrendered peacefully (T. 227). Sooter testified he was a former roommate of the Petitioner (T. 731). He described the Petitioner's character as "calm and jovial" (T. 732) and testified the Petitioner had a girlfriend to whom he never saw the Petitioner direct any violence (T. 733).

Martha Hitchcock, the Petitioner's sister, testified that she lived with the Petitioner for over thirteen years and never knew him to be a violent person (T. 737). James Hitchcock, one of the Petitioner's older brothers, gave similar testimony (T. 739). James Hitchcock also testified the Petitioner stayed for an unspecified period with him and his three children (T. 741-742). Fay Hitchcock, the wife of James Hitchcock, testified she had known the Petitioner for nine years and had never known him to exhibit violence (T. 744). Brenda Reed, another sister of the Petitioner, testified she had never known him to exhibit violence (T. 747).

The testimony reveals that when the Petitioner was taken into custody he did not, contrary to the allegation in the *Amended Petition*, initially confess to the killing of Cynthia Driggers. The Petitioner testified that on the day of his arrest, he denied any involvement. It was not until four days later that he confessed (T. 771-772). At trial, the Petitioner explained in detail why he confessed. His first reason was that he had been in isolation for a period of four days and wanted to die (T. 772). His second reason was that his girlfriend had left him (T. 772). Then the Petitioner explained that he

had been on his own since age thirteen and was then age twenty. He further testified his father died when he was only six (T. 773-774). The final reason which he advanced for changing his testimony was that his brother Richard had been like a father to him and because of Richard's arthritic condition he "couldn't see him (Richard) doing this time" (T. 777). After that statement, the Petitioner said, "But from what my parents have stated to me and shown to me, I've took a crime for him before . . ." At this point an objection to the testimony was voiced by the state's attorney and the objection was sustained. Although there was no order from the court striking any portion of the testimony, the objection could only have been understood as having gone to the hearsay statement attributable to the Petitioner's parents. Hence, the record does not reflect that the Petitioner was prevented from developing his character for nonviolence or explaining why he made a confession totally inconsistent with his trial testimony. The transcript does indicate, however, that the Petitioner's attempts to introduce evidence related to Richard's character or reputation for violence were routinely rebuffed (T. 737, 740, 744, 777-778, 750-751, 794-795).

Normally rulings on the admission of evidence are not a basis for habeas corpus relief. *Nettles v. Wainwright*, 677 F.2d 410, 414 (5th Cir. Unit B, 1982). Where, however, such rulings preclude a defendant from adducing highly relevant testimony in support of his defense, they may of course constitute a denial of the Fourteenth Amendment's guarantee of a fair trial. *Green v. Georgia*, 442 U.S. 95 (1979); *Wilkerson v. Turner*, 693 F.2d 121, 123 (11th Cir. 1982). The issue then becomes whether or not the exclusion of the proffered testimony dealing with Richard's violent character and Petitioner's having previously taken some blame (i.e. "took a crime") for Richard was so relevant to the defense that its exclusion denied the Petitioner a fair trial.



Evidence of a person's character or a trait of character is usually not admissible to prove that he acted in conformity therewith on a particular occasion. See Rule 404(a), *Fed. R. Evid.* Whatever slight relevance such evidence might have is not sufficient to overcome the policy which favors its exclusion to protect reputation and to diminish the possibility of misleading the trier of fact. The reputation of Richard for violence had such slight probative value to support the Petitioner's contention, this court cannot conclude that its exclusion denied the Petitioner a right to a fair trial. The evidence shows without question that Richard was married to the mother of the thirteen year old victim and had been living with her and her four minor children (including the victim) for a period of at least two years before the murder (T. 273-274). Under these circumstances, there is just simply no logical connection between the proferred testimony and the fact sought to be corroborated. Similarly the proffered hearsay evidence was of such minimal significance its exclusion did not violate Petitioner's right to due process.

The fourth ground for relief asserts that a communication between the trial court and the jury in the absence of defense counsel denied Petitioner a fair trial. During the course of the jury deliberations, the jury sent a note to the trial judge which asked: "Is it required for us to recommend death penalty or life at this time?" The trial judge without consulting counsel for the Petitioner or the state responded: "You should not consider any penalty at this time—only guilt or innocence." See Record, page 165. The Petitioner argues that this communication to the jury denied him due process. According to Petitioner, it implied that the trial judge viewed the Petitioner as guilty and at the same time suggested to the jury that it should not consider the seriousness of the possible penalty in arriving at a verdict as to guilt or innocence. In the opinion of this court, the argument is frivolous. The trial judge had

earlier given the jury without objection an instruction virtually identical to that included in his response to the jury's note. At the close of the evidence on the guilt phase of the trial, the judge instructed the jury:

> You are not to be concerned at this point with the imposition of any penalty in the event you reach a verdict of guilty. . . . [I]f you return a verdict of guilty of Murder in the First Degree, you will then be called on, in a separate sentencing proceeding, to return an Advisory Sentence as to whether the punishment should be death or life imprisonment, which Advisory Sentence the Court is not required to follow. When you have determined the guilt, or innocence of the accused, you have completely fulfilled your solemn obligation under your oaths as Jurors.

The trial judge also instructed the jury in the following language that the decision on guilt or innocence was theirs and that no comment by him should be taken as implying his view as to guilt or innocence:

> Nothing I have said in these instructions, or at any other time during the trial, is any intimation whatever as to what verdict I think you should find.

Finally, it is obvious from the note itself that the jury was well aware that the death penalty was a possible sanction attendant upon the conviction. Nothing in the judge's response could rationally be said to have diminished the seriousness of the offense in the jury's mind.

The fifth ground for relief is that the aggravating circumstances considered by the jury failed to channel sentencing discretion as required by the Eighth and Fourteenth Amendments. The first argument advanced in support of this ground is that the aggravating circumstance of sexual battery was not supported by adequate evidence. As noted above, the record contains ade-



quate evidence to support the felony of sexual battery as defined in § 794.011(3), *Fla. Stat.* (1975).

The Petitioner also argues under this ground that the catalog of aggravating circumstance delineated in the death penalty statute refers to "rape" *not sexual battery*. *See* § 921.141(5)(d), *Fla. Stat.* (1975). When the Florida death penalty statute was initially adopted, the term "rape" was used in Florida to denote the well-known offense. See § 794.01, *Fla. Stat.* (1973). Unfortunately the term was not modified in the death penalty statute when in 1974 the Florida legislature redefined "rape" in a comprehensive statute using the terminology "sexual battery". See § 794.01, *Fla. Stat.* (1974). Rape was defined in the statutes of Florida in effect when the death penalty statute was first enacted as follows:

> 794.01 Rape and forcible carnal knowledge; penalty.—
>
> (1) Whoever of the age of seventeen years or older unlawfully ravishes or carnally knows a child under the age of eleven is guilty of a capital felony, punishable as provided in § 775.082.

§ 794.01(1), *Fla. Stat.* (1973). The offense of rape as thus defined is for all practical purposes the same as "sexual battery" defined in the present Florida statute and included in the trial judge's charge.

The remaining contentions which the Petitioner makes in support of the ground in question simply take issue with the validity of the aggravating circumstances which may be considered under the Florida death penalty statute. The statute, however, has been held to be constitutional and the Petitioner's argument is thus foreclosed. See *Proffitt v. Florida*, 428 U.S. 242 (1976), and *Barclay v. Florida*, No. 81-6908, —— U.S. —— (6 July 1983).

The Petitioner's sixth ground for relief is that "(his) death sentence was imposed in proceedings which pre-

cluded by operation of law the consideration of relevant mitigating circumstances in violation of the Eighth Amendment requirement that there be no bar to the presentation and consideration of relevant mitigating evidence." With respect to this ground, the Petitioner argues that the trial judge refused to consider as mitigating the evidence relating to the Petitioner's mental and emotional problems, his voluntary surrender, the evidence as to his nonviolent character, doubt of guilt, and the fact that the state offered a life term in return for a plea of guilty. The short answer to this contention is that the trial judge was not required to consider those factors as mitigating. As pointed out in *Barclay v. Forida, supra,* the sentencing decision calls for the exercise of judgment. The only requirement of the Constitution is that the judgment be directed by suitable statutory guidelines. The trial judge stated before pronouncing sentence: "The court has weighed and considered the total evidence received in this case . . ." See transcript of Sentencing Proceedings 11 February 1977, at page 6.

Also under this ground, the Petitioner argues that the judge limited the jury's consideration to the list of mitigating circumstances set forth in the Florida death penalty statute. It is true that the jury was instructed on the mitigating circumstances delineated in § 921.141 (6), *Fla. Stat.* (1977); however, the jury was not precluded from consideration of any relevant evidence offered in mitigation of punishment. The trial judge told the jury its consideration of aggravating circumstances was limited to the statutory list. In contrast, he instructed the jury with reference to mitigating circumstances:

> Should you find, however, sufficient of these aggravating circumstances to exist, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances which you have found to exist. The mitigating circumstances which you may consider shall be the following: . . . [the statutory mitigating circumstances] . . . If one or more aggravating circumstances are established, you should consider all of the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive and (sic) in arriving at your conclusion as to the sentence which should be imposed.

Transcript of Advisory Hearing at 55-58.



Furthermore, no restriction was imposed on the evidence which Petitioner offered at the sentencing trial, and, in fact, testimony was adduced of nonstatutory mitigating circumstances dealing with his family background. In his argument to the advisory jury defense counsel discussed at some length Petitioner's family history, his nonviolent character, including the fact of his voluntary surrender, and his capacity for rehabilitation if offered a life sentence (T. of Advisory Hearing p. 12-26). The Petitioner's argument is foreclosed by *Ford v. Strickland*, 696 F.2d 804, 811 (11th Cir. 1983) because, for the reasons mentioned, neither the jury nor the trial judge was denied the use of any relevant evidence of mitigation. See also *Antone v. Strickland*, 706 F.2d 1534 (11th Cir. 1983); *mod. on rehr.* No. 82-5120, *Slip Op.* 6 Sept 1983.

Finally, the Petitioner argues that available evidence in mitigation was not presented either because defense counsel was ineffective or because the Florida statute precluded evidence of nonstatutory mitigating circumstances. The Florida statute in effect at the time did not expressly limit the jury's consideration to the mitigating circumstances delineated therein. Although dictum in *Cooper v. State.* 336 So.2d 1133 (Fla. 1976), *cert. denied,* 431 U.S. 925 (1977), suggested that the statutory mitigating circumstances were exclusive, decisions of the Florida Supreme Court published prior to the trial indi-

cate that the statutory mitigating circumstances were not exclusive. Those cases are reviewed in *Songer v. State*, 365 So.2d 696 (Fla. 1978), *cert. denied*, 441 U.S. 956 (1979). The Petitioner suggests that his counsel was ineffective at the penalty phase of the trial because he did not adduce testimony of a psychologist discussing Petitioner's character and his capacity for redemption. Petitioner embodied in his *Amended Petition* at page 41 an excerpt from a report by a psychologist used at his executive clemency hearing as an example of what effective counsel should have offered. This type evidence Petitioner claims would have had two purposes. One would be to show doubt of guilt—the other to show Petitioner's capacity for rehabilitation. Counsel can hardly be considered ineffective in a capital case because at the penalty phase he did not adduce evidence to raise a doubt of guilt. Obviously at that stage, doubt of guilt has been eliminated as an issue for the jury's consideration. Counsel cannot be held ineffective, unless his choice of strategy was so patently unreasonable that no competent attorney would have chosen it and actual and substantial prejudice resulted from the choice. *Adams v. Wainwright*, 709 F.2d 1443 (11th Cir. 1983); *Wiley v. Wainwright*, 709 F.2d 1412 (11th Cir. 1983). In the present case, substantial evidence as to Petitioner's character and background was presented to develop mitigating factors, and Petitioner's attorney strongly argued to the advisory jury the possibility of rehabilitation. In light of what was done, counsel cannot under the established standard be deemed ineffective for not producing opinion evidence from a psychologist.

The seventh ground for relief is stated as follows in the petition: "Petitioner's Eighth Amendment right to be punished in proportion to his crime, and his Fourteenth Amendment right to due process, were violated by the trial court's approval of the state's offer to Petitioner of a plea of nolo contendere and life imprisonment, followed by the court's imposition of the death sentence after Petitioner rejected the plea offer and proceeded to



trial." Even if Petitioner's factual assertions are true, this ground is patently without merit. The argument of the Petitioner basically is that having rejected the tendered plea agreement, he could go to trial with immunity from the death penalty. The Petitioner cites *North Carolina v. Pearce*, 395 U.S. 711 (1969), *United States v. Jackson*, 390 U.S. 570 (1968), and *Corbitt v. New Jersey*, 439 U.S. 212 (1978) as supporting his contention. None of these cases supports the contention, and *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) stands clearly in opposition.

The eighth ground for relief is that, "The Florida death penalty statute, as applied, deprives death-sentenced individuals, whose sentences are based upon erroneously found aggravating circumstances, of critical Eighth and Fourteenth Amendment rights, because the Florida Supreme Court consistently sustains such death sentences so long as there is at least one valid aggravating circumstance, and no substantial mitigating circumstances, present." This ground is without merit and subject to summary dismissal on the authority of *Barclay v. Florida, supra.*

The ninth ground for relief is that, "The Florida Supreme Court's cursory, incomplete review of the aggravating and mitigating circumstances in petitioner's case vitiated the court's unique responsibilities in the review of capital prosecutions." With respect to this ground the Petitioner argues that the Florida Supreme Court failed to review the aggravating circumstances, failed to review the claim that nonstatutory mitigating factors should have been found, and failed to review the trial court's failure to find as mitigating the mental or emotional problems of the Petitioner and doubt about his guilt.

With regard to the assertion that doubt about guilt should enter into the sentencing equation, the Petitioner's contention is without any support known to this court. The sentencing aspect of the trial does not com-

mence until guilt has been established. Therefore, doubt about guilt should not enter the sentencing process. If a doubt about guilt exists, such would be a ground for a reversal of the conviction itself.

It is clear from the dissent in connection with the plenary appeal that the mental and emotional problems of the Petitioner were considered by the Florida Supreme Court. Furthermore, the opinion of the majority reflects that the case was carefully reviewed on the grounds presented.

The Petitioner's penultimate ground for relief challenges the Florida Supreme Court's former practice of reviewing psychological profiles of persons sentenced to death. This ground for relief has been foreclosed by *Ford v. Strickland, supra.*

The final ground for habeas relief is: "As applied, the Florida death penalty statute violates the Eighth and Fourteenth Amendments because it fails to channel jury discretion and permits the interjection of irrelevant factors into the sentencing process by the jury and judge."

Most of the argument embodied in the petition in support of this ground has been foreclosed by *Proffitt v. Florida, supra,* wherein the Supreme Court held the Florida death penalty statute to be constitutional. The following are the only arguments of Petitioner which warrant comment in the opinion of this court. The Petitioner claims that the instruction on aggravating and mitigating circumstances did not require the state to prove aggravating circumstances beyond reasonable doubt. This is simply inconsistent with the trial court's instructions which did require proof of aggravating circumstances beyond reasonable doubt. The Petitioner also complains that the jury instructions did not tell the jury how to determine whether or not the mitigating circumstances outweighed the aggravating circumstances. The answer to this is that the statutory scheme obviously requires a value judgment from the jury and the trial



judge. It is not for that reason invalid. *Barclay v. Florida, supra,* Slip Op. at 10.

Next the Petitioner asserts that the trial judge's instructions could have left the jury with the impression that the burden of proving mitigating circumstances was on the Petitioner. Aside from the fact that such does not appear to be a logical conclusion from the instructions themselves, it does not make sense to talk of burdens of proof in connection with evidence of mitigating factors. This is so because no particular quality of proof is required to permit the jury to give probative effect to evidence tending to establish mitigation. The trial judge instructed the jury:

> If one or more aggravating circumstances are established, you should consider *all the evidence tending to establish* one or more mitigating circumstances and give that evidence such weight as you feel it should receive . . . (Emphasis added)

Transcript of Advisory Hearing at 57.

Finally, the contention is made that nonstatutory factors affect the imposition of the death penalty. The Petitioner asserts such factors as geography, sex of the defendant, occupation and race of the victim, as well as others may have influence on the sentencing decisions of the trial jury or trial judge, or both. This argument was rejected as a matter of law in *Spenkelink v. Wainwright,* 578 F.2d 582, 613 (5th Cir. 1978), where the court held:

> . . . if a state follows a properly drawn statute in imposing the death penalty, then the arbitrariness and capriciousness—and therefore the racial discrimination—condemned in *Furman* have been conclusively removed. Florida has such a statute and it is being followed. The petitioner's contention under the Eighth and Fourteenth Amendments is therefore without merit.

It is obviously impossible for the legislature to devise any statutory scheme that will insure completely uniform results. Where, however, a statute has adequate safeguards against capricious imposition of the death penalty, and the statutory procedure is followed, disparate results in similar cases are not a constitutional problem in the absence of intentional discrimination on an impermissible basis. Such is not alleged here.

*Conclusions*

Rule 4 of the *Rules Governing Section 2254 Cases in the United States District Courts* contemplates that on initial review of the petition by the district court, the judge may summarily dismiss the petition in its entirety if the petition lacks arguable merit. The court has carefully reviewed the *Amended Petition*, all attachments thereto and the entire record from the state trial court. Based thereon, this court concludes the *Amended Petition* lacks arguable merit and should be summarily dismissed without an evidentiary hearing.

DATED at Orlando, Florida, this 22nd day of September, 1983.

/s/ John A. Reed, Jr.
JOHN A. REED, JR.
Judge

[Notification of Distribution Omitted in Printing]



UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

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No. 83-3578

JAMES ERNEST HITCHCOCK, PETITIONER-APPELLANT

*v.*

LOUIE L. WAINWRIGHT, RESPONDENT-APPELLEE

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Oct. 18, 1984

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Appeal from the United States District Court
for the Middle District of Florida

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**OPINION ON GRANTING REHEARING EN BANC JAN. 8, 1985.**

Before RONEY and JOHNSON, Circuit Judges, and MORGAN, Senior Circuit Judge.

RONEY, Circuit Judge:

James Ernest Hitchcock was convicted and sentenced to death for the strangulation of his brother's thirteen-year-old stepdaughter. After a direct appeal and post-conviction proceedings in the Florida state courts,[1] Hitch-

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[1] Petitioner's conviction and sentence were affirmed by the Florida Supreme Court in *Hitchcock v. State*, 413 So.2d 741 (Fla.), *cert. denied*, 459 U.S. 960, 103 S.Ct. 274, 74 L.Ed.2d 213 (1982). Petitioner's motion to vacate judgment and sentence was denied in state circuit court and the Florida Supreme Court affirmed. *Hitchcock v. State*, 432 So.2d 42 (Fla. 1983).

cock petitioned in federal district court for a writ of habeas corpus. The district court denied the writ without an evidentiary hearing. We affirm.

Petitioner Hitchcock raises numerous issues on this appeal: (1) whether Florida law discouraged his attorney from investigating and presenting nonstatutory mitigating factors; (2) whether the trial court considered petitioner's refusal to plead guilty in imposing the death sentence; (3) whether the evidence was sufficient to support his conviction; (4) whether the death penalty in Florida has been imposed in arbitrary and capricious manner either because of: (a) a defect in Florida's death penalty statute, Fla.Stat.Ann. § 921.141, (b) Florida law which required the jury be instructed on all lesser degrees of the charged offense whether or not there was evidence to support a conviction on the lesser degrees, or (c) racial discrimination; and (5) whether the *Brown* issue as decided in *Ford v. Strickland*, 696 F.2d 804 (11th Cir.) (en banc), *cert. denied*, —— U.S. ——, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983), should be reconsidered. We will address each issue in that order.

The facts of the case can be briefly summarized. Thirteen-year-old Cynthia Driggers was murdered by strangulation on July 31, 1976. Her body was recovered later that same day. An autopsy revealed that Driggers' hymen had been recently lacerated and that sperm was present in her vagina. Her face had cuts and bruises in the vicinity of the eyes. On August 4, 1976, petitioner confessed to the murder. He claimed that he and the victim had consensual sexual relations and he killed her when she became upset afterward and threatened to tell her parents. At trial, petitioner changed his story. He testified his brother Richard, the girl's stepfather, discovered Cynthia and him having intercourse and reacted by strangling the girl.

*Restriction of Mitigating Evidence*

Petitioner argues the district court should have held an evidentiary hearing on the question of whether he was



denied a fair and individualized capital sentencing determination by the preclusion of nonstatutory mitigating factors as a result of either the operation of state law or the denial of effective assistance of counsel because of his counsel's belief that Florida law barred such evidence. After examining the law regarding admission of mitigating evidence as developed in both Florida and federal courts and reviewing the facts of this case, we conclude no constitutional infirmity exists in regard to petitioner's sentencing hearing.

Florida re-enacted its death penalty statute following *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), which in effect held all extant capital penalty statutes to be unconstitutional. The new statute contained a list of factors designed to guide discretion in the imposition of the death sentence. Both aggravating and mitigating factors were listed. The statute explicitly limited those circumstances that could be considered as aggravating. No such restrictive language, however, was used in conjunction with the mitigating circumstances. *See* Fla.Stat. § 921.141 (1972). This feature was noted by the Supreme Court in its opinion holding the statute to be constitutional. *Proffitt v. Florida*, 428 U.S. 242, 250 n. 8, 96 S.Ct. 2960, 2965 n. 8, 49 L.Ed.2d 913 (1976) ("There is no such limiting language introducing the list of statutory mitigating factors.").

The importance of a lack of restriction on the sentencer's consideration of mitigating circumstances in fixing the penalty for a capital crime was confirmed by the Supreme Court in *Lockett v. Ohio*, 438 U.S. 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978). The Court held unconstitutional an Ohio statute which limited mitigating evidence to a narrow set of factors. As to the distinction between the Ohio and the Florida statute, the Court made the following observation:

> Although the Florida statute approved in *Proffitt* contained a list of mitigating factors, six members of the Court assumed, in approving the statute, that

> the range of mitigating factors listed in the statute was not exclusive . . . . None of the statutes we sustained in *Gregg* [428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859] and the companion cases clearly operated at that time to prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor.

438 U.S. at 606-07, 98 S.Ct. at 2965-66.

Two years prior to *Lockett* and six days after the decision in *Proffitt*, the Florida Supreme Court in *Cooper v. State*, 336 So.2d 1133 (Fla. 1976), *cert. denied*, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977), used language which some contend should be interpreted as limiting the introduction of mitigating circumstances to those enumerated in the statute. The court upheld a trial court's refusal to admit testimony regarding a capital defendant's employment history as a mitigating circumstance. The defendant argued that his employment history demonstrated he was not beyond rehabilitation. Neither employment history nor potential for rehabilitation are statutory mitigating factors. *See* Fla.Stat.Ann. § 921.141(3). The court rejected the defendant's argument, reasoning that employment history was not particularly probative of a person's ability to conform to the law and that

> [i]n any event, the Legislature chose to list the mitigating circumstances, which it judged to be reliable for determining the appropriateness of a death penalty . . . and we are not free to expand that list.

336 So.2d at 1139. In a footnote, the court emphasized the restrictive design of the Florida statute as regards to both aggravating and mitigating factors, stressing that the statute only would limit the arbitrariness condemned in *Furman* if discretion was limited "whether operating for or against the death penalty." 336 So.2d



at 1139 n. 7. *See Perry v. State*, 395 So.2d 170, 174 (Fla. 1980) (trial judge interpreted *Cooper* as barring non-statutory mitigating evidence).

Two years later and shortly after the decision in *Lockett*, the Florida Supreme Court in *Songer v. State*, 365 So.2d 696 (Fla.1978), *cert. denied*, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979), clearly held the Florida death penalty statute does not restrict the mitigating evidence to the factors enumerated in the statute. In denying a motion for rehearing which argued that the Florida statute as interpreted by *Cooper* violated *Lockett*, the Florida court said:

> In *Cooper*, this Court was concerned not with whether enumerated factors were being raised as mitigation, but with whether the evidence offered was probative. Chief Justice Burger, writing for the majority in *Lockett*, expressly stated that irrelevant evidence may be excluded from the sentencing process. 98 S.Ct. at 2965 n. 12. *Cooper* is not apropos to the problems addressed in *Lockett*.

As concerns the exclusivity of the list of mitigating factors in Section 921.141, the wording itself, and the construction we have placed on that wording in a number of our decisions, indicate unequivocally that the list of mitigating factors is not exhaustive. This was noted, in fact, in *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 409 L.Ed.2d 913 (1976).

We have approved a trial court's consideration of circumstances in mitigation which are not included on the statutory list in *Washington v. State*, 362 So.2d 658 (Fla.1978); *Buckrem v. State*, 355 So.2d 111 (Fla.1978); *McCaskill v. State*, 344 So.2d 1276 (Fla.1977); *Chambers v. State*, 339 So.2d 204 (Fla. 1976); *Meeks v. State*, 336 So.2d 1142 (Fla.1976); *Messer v. State*, 330 So.2d 137 (Fla.1976); and *Halliwell v. State*, 323 So.2d 557 (Fla.1975), among others. Obviously, our construction of Section 921.141

(6) has been that all relevant circumstances may be considered in mitigation, and that the factors listed in the statute merely indicate the principal factors to be considered.

365 So.2d at 700 (footnote omitted).

Prior to that decision, this Court had addressed the issue of whether Florida's death penalty statute as interpreted in *Cooper* violated *Lockett*. In *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir.1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979), we reviewed *Proffitt* and *Lockett* and stated "[t]he conclusion is inevitable that the [Supreme] Court continues to view Section 921.141 as constitutional. . . . Obviously, we are without power or authority to overrule the express finding of the Supreme Court." 578 F.2d at 621. Spinkellink was tried in 1973, prior to *Cooper*. Spinkellink presented and argued to the jury circumstances not fitting within the statutory mitigating categories.

Petitioner here was tried in January, 1977, which was after the Florida court's decision in *Cooper* but before the United States Supreme Court's decision in *Lockett*. Thus, petitioner argues that his counsel, misled by *Cooper* and without the clarification of *Lockett* and *Songer*, believed that he was limited to presenting evidence in mitigation that fit within one of the statutorily enumerated listings. In one context or another, this basic legal problem has been argued to this Court several times since *Spinkellink* but in no case has relief been granted because of *Cooper*.

In *Proffitt v. Wainwright*, 685 F.2d 1227 (11th Cir. 1982), *cert. denied*, —— U.S. ——, 104 S.Ct. 508, 78 L.Ed.2d 697 (1983), it was argued that Proffitt's trial attorney was ineffective because he failed to present evidence of nonstatutory mitigating circumstances during the penalty phase of his trial in March, 1974. The Court indicated that at the time of Proffitt's trial which was prior to *Cooper*, it was reasonable to assume that evidence of nonstatutory mitigating circumstances was not admissible. 685 F.2d at 1248. In that case, however, the attorney testified that he believed that he could fit any mitigating evidence within the statutory mitigating factors and that, in any event, the defendant had instructed him not to introduce mitigating evidence. 685 F.2d at 1238-39.



In *Ford v. Strickland*, 696 F.2d 804 (11th Cir.) (en banc), *cert. denied*, —— U.S. ——, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983), it was argued that the jury instructions at the penalty phase of his trial restricted the jury from considering nonstatutory mitigating circumstances. Ford did not object to the instructions at trial or on direct appeal. The Court denied relief because Ford had not been limited in the admission of mitigating evidence and thus could show no prejudice. 696 F.2d at 813.

A similar issue was involved in *Foster v. Strickland*, 707 F.2d 1339, 1346-47 (11th Cir.1983), and the Court again held that no prejudice was shown because the petitioner did not suggest any supported nonstatutory mitigating evidence in the habeas corpus proceeding.

In the instant case, the district court dismissed this claim on the grounds that Florida law did not limit what evidence could be produced in mitigation at the penalty stage and that the record indicated petitioner's attorney did not think he was constrained by the statute. Based on our prior precedents, the district court properly denied relief and an evidentiary hearing. The evidence proffered to the district court does not establish the right to constitutional relief. The record belies the argument that at the time of the case, the presentation to the jury would have been appreciably different had it not been for the possible confusion of petitioner's attorney as to the law on mitigating circumstances.

Petitioner submitted an affidavit of the attorney, a public defender, who represented him at trial and sentencing. The affidavit of the attorney is carefully written. It states that although the attorney does not have

an independent recollection, he is of the opinion, upon reviewing the transcript, that during his representation of petitioner his perception was that consideration of mitigating circumstances was limited to the factors enumerated by the statute. It says he is aware of the current status of the case and that evidence of relevant mitigating circumstances was not investigated or presented in petitioner's sentencing trial. The affidavit does not indicate, however, that he would have done anything differently at that time. In *Proffitt*, this Court denied relief on a record where the defendant's attorney testified unequivocally that at the time of trial, he understood the Florida statute as limiting the mitigating evidence that could be introduced to that falling within the statutory mitigating circumstances. Although the attorney testified he believed he could fit any mitigating evidence within that scope, this Court stated that

> the defense attorney's belief that he could not, under the Florida statute, introduce evidence of mitigating factors not listed in Fla.Stat. § 921.141(6) was entirely reasonable. His decision not to call witnesses at the penalty stage to testify about appellant's general character and background was therefore justifiable and fully within the sixth amendment standard of reasonably effective assistance.

*Proffitt*, 685 F.2d at 1248.

At the sentencing hearing, petitioner's attorney called petitioner's brother, James, who testified about petitioner at the age of five or six, about his father's death, about the farm work of both the mother and the father hoeing and picking cotton in Arkansas, that there were seven children in the family, and that he left "Ernie" to babysit with the brother's small children. Other testimony relating to petitioner's character had come out at trial. Petitioner testified he left home when he was thirteen because he could not tolerate seeing his stepfather abuse his mother. His mother testified that he was a



good child and he minded her. Three of his siblings told the jury he was not a violent person. During closing argument the attorney referred to much of the evidence not fitting squarely within the confines of the statutory mitigating circumstances including the difficult circumstances of petitioner's upbringing, the possibility of rehabilitation, and that petitioner voluntarily turned himself in. Finally, he admonished the jury to "look at the overall picture. You are to consider everything together . . . consider the whole picture, the whole ball of wax."

Petitioner has suggested several different pieces of evidence of nonstatutory mitigating circumstances which might have been presented. First, he argues that testimony by psychologists could have been introduced which would have corroborated lingering doubts about guilt and shown petitioner was an excellent candidate for rehabilitation. Such testimony would tend to establish his innocence, he says, by bringing out that he had coped with stressful situations throughout his life by retreating or escaping. There is no indication in this record, however, that the attorney at the time of sentencing would have followed this course even if he had known he could. Such matters are not judged from hindsight. *Strickland v. Washington*, —— U.S. ——, ——, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674, 694 (1984). It should be noted that mental and emotional conditions are statutorily permitted mitigating considerations. Fla.Stat.Ann. § 921.141(4)(b). Petitioner has cited us no cases holding that the mere failure to investigate or produce psychological or psychiatric evidence renders a sentencing proceeding unconstitutional.

Petitioner argues that greater details as to his upbringing in an environment of extreme poverty, his solid character traits, devotion to hard work, willingness to contribute to the family's support, and respect for adults should have been presented as evidence of nonstatutory mitigating factors. All of this was developed, however, to some extent for the jury. As described above, ele-

ments of petitioner's character and other background information were testified to by petitioner's brother, sisters, and mother as well as by petitioner himself. Petitioner's trial counsel reminded the jury of these facts during closing argument in the penalty phase.

It thus appears that petitioner was not denied an individualized sentencing hearing.

*Life Sentence Offered for Guilty Plea—*
*Death Sentence Imposed After Conviction*

Petitioner asserts that the state trial judge imposed the death sentence as punishment for petitioner's decision to go to trial rather than plead guilty. Petitioner alleged that the prosecutor and the judge together offered him a plea bargain which would exchange his plea of guilty for a life sentence. Petitioner declined the offer. After trial, the judge on the jury's recommendation sentenced petitioner to death. Petitioner argues his death sentence must be overturned because the trial judge's sentencing order did not explain why death became an appropriate penalty after trial.

The record is unclear as to whether the trial judge indicated he would approve a life sentence on guilty plea, or merely would consider it.[2] We treat the case as if the defendant would have received a life sentence on a guilty plea.

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[2] MR. TABSCOTT [defense counsel]: I would also remind the Court that prior to trial, the Court did argue to a plea of nolo contendere giving the defendant a life sentence on that plea. I have nothing further.

THE COURT: I think the record ought to show that the matters we discussed, there was never any understanding, because your client didn't want to consider any plea.

MR. TABSCOTT: That plea was offered to him by the State and the Court, however. And, it is true he declined to enter that plea.

THE COURT: Any other matters?

MR. TABSCOTT: No, sir.



Although the principle petitioner argues would apply on a retrial and a resentencing after a successful appeal, *North Carolina v. Pearce*, 395 U.S. 711, 726, 89 S.Ct. 2072, 2081, 23 L.Ed.2d 656 (1969); *Blackledge v. Perry*, 417 U.S. 21, 28-29, 94 S.Ct. 2098, 2102-2103, 40 L.Ed.2d 628 (1974), it does not apply to the failure of a plea bargain. *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S.Ct. 663, 668, 54 L.Ed.2d 604 (1978). In the "give-and-take" of plea bargaining, the state may extend leniency to a defendant who pleads guilty, foregoing his right to jury trial. *Brady v. United States*, 397 U.S. 742, 753, 90 S.Ct. 1463, 1471, 25 L.Ed.2d 747 (1970). Legislative schemes which extend the possibility of leniency to defendants who plead guilty are permissible so long as the statute does not unnecessarily burden the assertion of constitutional rights or act to coerce inaccurate guilty pleas. *Compare United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968) (statute invalid when defendant could only receive death sentence if he went to trial) *with Corbitt v. New Jersey*, 439 U.S. 212, 99 S.Ct. 492, 58 L.Ed.2d 466 (1978) (statute valid when plea of *non vult* gave possibility of sentence of not more than 30 years but conviction at trial carried mandatory life sentence). A judge, as with the prosecutor and the legislature, should not be precluded from approving leniency in sentencing upon an admission of guilt. *Cf. Corbitt*, 439 U.S. at 224 n. 14, 99 S.Ct. at 500 n. 14 (cannot permit prosecutor to offer leniency but not legislature).

Sentencing after conviction following a failed plea bargain presents a different situation from sentencing after a prior sentence and retrial. Upon a second conviction, a defendant stands in the same posture for sentencing that he did after his first conviction. Presumably all facts have been before the court for determination of the correct sentence. Unless the court cites circumstances which occurred after his original sentence, a greater sentence would appear to be for no reason other than a pen-

alty for the defendant's challenging of his conviction. *See Wasman v. United States*, —— U.S. ——, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984). A defendant who pleads guilty, however, is in a markedly different posture than a defendant who is convicted at trial. Only after trial and a sentencing hearing has the trial court learned all of the facts which might be considered for sentencing. On a plea bargain, the defendant's and prosecutor's agreement forecloses the necessity for such a detailed explanation. Moreover, by pleading guilty a defendant confers a "substantial benefit to the state:"

> the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof.

*Brady v. United States*, 397 U.S. at 752, 90 S.Ct. at 1471. The state is entitled to extend a sentence of less than that which might otherwise be appropriate to a defendant that confers such a benefit on it. 397 U.S. at 753, 90 S.Ct. at 1471. The heart of a plea bargain from a defendant's point of view is the option of avoiding a possibly harsher sentence upon conviction at trial.

There is no merit to the argument that the sentencing judge should have set forth the reasons why the sentence after trial was greater than what would have been approved on a guilty plea. Absent a demonstration by the defendant of judicial vindictiveness or punitive action, a defendant may not complain simply because he received a heavier sentence after trial. *Blackmon v. Wainwright*, 608 F.2d 183 (5th Cir.1979), *cert. denied*, 449 U.S. 852, 101 S.Ct. 143, 66 L.Ed.2d 64 (1980). We have held that a mere allegation of discrepancy between a defendant's actual sentence and that which he would



have received had he foregone trial to plead guilty does not invalidate the sentence. *Smith v. Wainwright*, 664 F.2d 1194, 1197 (11th Cir.1981).

That the death penalty is involved in this case does not alter the principle of law. Given the different situations presented by a defendant who pleads guilty and a defendant convicted after trial, the possibility of different sentences depending on whether or not the defendant pleads guilty does not run afoul of the requirement that the "decision to impose the death sentence be, and appear to be, based on reason. . . ." *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). In this case, the Court imposed the death penalty only after fully considering the aggravating and mitigating circumstances and receiving the jury's recommendation of death. The procedure in Florida fully meets the Ninth Circuit's requirements that if a court participates in plea bargaining "the record must show that the court sentenced the defendant solely upon the facts of his case and his personal history, and not as punishment for his refusal to plead guilty." *United States v. Stockwell*, 472 F.2d 1186, 1187-88 (9th Cir.), *cert. denied*, 411 U.S. 948, 93 S.Ct. 1924, 36 L.Ed.2d 409 (1973).

A trial court which approved a sentence based on a plea bargain prior to trial need not, upon rejection of that offer and conviction at trial, restrict its sentence to that offered for the plea bargain, set forth reasons for harsher sentence, nor impose such sentence only for conduct occurring after the aborted plea bargaining.

*Sufficiency of the Evidence*

In petitioner's guilt-innocence trial, the jury was instructed that it could find petitioner guilty of first degree murder upon alternative theories: premeditated murder or felony murder. The jury returned a general verdict of guilty of first degree murder.

Petitioner argues that the prosecution failed to prove felony-murder because the facts did not show that the felony of sexual battery had occurred but that the evidence supported his claim that the victim consented to sexual relations. He contends that since it cannot be determined on which theory the jury based its verdict, the conviction must be reversed. The issue turns on whether there was sufficient evidence to support the felony murder theory without running afoul of *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

"[A] general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient. . . ." *Zant v. Stephens*, 462 U.S. 862, ——, 103 S.Ct. 2733, 2745, 77 L.Ed.2d 235, 252 (1983); *Stromberg v California*, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931). The test for sufficiency of the evidence on habeas corpus is whether viewing the evidence in the light most favorable to the Government "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S.Ct. 2781, 2792, 61 L.Ed.2d 560 (1979); *Cosby v. Jones*, 682 F.2d 1373, 1379 (11th Cir.1982). A defendant cannot be sentenced to death for participating in a felony with no intent to participate in a murder. *Enmund*, 458 U.S. at 801, 102 S.Ct. at 3378. Where the defendant himself participates in both the felony and the intentional killing, that principle does not apply. *Adams v. Wainwright*, 709 F.2d 1443, 1447 (11th Cir.1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 745, 79 L.Ed.2d 203 (1984).

The evidence at trial showed that petitioner was temporarily staying at his brother's house. On the night in question, he returned to the house at a late hour and entered through a window. Petitioner admitted having sexual relations with his brother's thirteen-year-old stepdaughter. The young girl complained he had hurt her and that she was going to tell her parents. A medical



examination revealed the girl was previously of chaste character. This evidence was sufficient to prove that petitioner committed sexual battery by force. The evidence was sufficient to show that the homicide occurred intentionally, not accidentally in the course of an unrelated felony.

*Arbitrariness of Death Penalty in Florida*

Petitioner raises three different arguments in support of the contention that the imposition of the death penalty in Florida violates the Eighth and Fourteenth Amendments. First, petitioner asserts that at the time of his trial the commission of rape in conjunction with the capital felony was listed as a statutory aggravating factor although the Florida legislature had replaced the crime of rape with the crime of sexual battery.

One of the aggravating factors in Florida's post-*Furman* death penalty statute was: "[t]he capital felony was committed while defendant was engaged . . . in the commission of . . . rape . . . ." Fla.Stat. § 921.141 (1972). In 1974, the Florida legislature rewrote the rape statute. 1974 Fla. Laws ch. 74-121 § 1. The legislature created the new crime of sexual battery which was broader than the repealed statutory crime of rape. *See* Fla.Stat.Ann. § 794.011. In 1976, the Florida Supreme Court dropped all reference to rape as an aggravating factor when it repromulgated its standard jury instructions. *Florida Standard Jury Instructions in Criminal Cases* at 77-82 (1976). The death penalty statute has now been amended to include the term sexual battery. 1983 Fla.Laws ch. 83-216 § 177.

There is no merit to petitioner's contention that at the time of petitioner's trial the law had become so unclear that it was likely to be applied in an arbitrary and capricious manner. The jury instructions at petitioner's guilt-innocence trial described the felony of sexual battery

which is equivalent to the traditicnal crime of rape.[3] In charging the jury during the penalty phase, the court again used the term sexual battery instead of rape. The statutory aggravating factor mentioning rape thus was not applied in an arbitrary manner in petitioner's case. Contrary to petitioner's assertion, the legislature's recataloguing of rape as sexual battery in the statute books did not make the statutory aggravating factor referred to as rape so vague as to be susceptible of arbitrary or capricious application. *See Hitchcock v. State*, 413 So.2d 741, 747-48 (Fla.), *cert. denied*, 459 U.S. 960, 103 S.Ct. 274, 74 L.Ed.2d 213 (1982).

Second, petitioner argues that at the time of this trial Florida required instructions on all lesser degrees of the charged offense even when there was no evidence to support these lesser offenses, thus rendering the system arbitrary and capricious. Petitioner waived any right to complain about the instructions as to lesser degree offenses in this case because the instructions given are the ones he requested. He waived any right to object to Florida's law on instructing on lesser degrees in other cases by his failure to object at trial or on direct appeal. *Ford v. Strickland*, 696 F.2d at 816-17. No "cause" for this failure to object can be shown because one of the major cases which forms the basis of petitioner's argument, *Roberts*

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[3] The judge charged the jury that:

> It is a crime to commit sexual battery upon a person over the age of 11 years, without that person's consent, and in the process use or threaten to use a deadly weapon, or use actual physical force likely to cause serious physical injury.
>
> Sexual battery means oral, and, or vaginal penetration by, or union with, the sexual organ of another . . . .

This language tracks the current sexual battery statute. Fla.Stat. Ann. § 794.011(h)(3). Now repealed Fla.Stat. 794.01 read as follows:

> (2) whoever ravishes or carnally knows a person of the age of eleven years or more, by force and against his or her will . . . shall be guilty of a life felony. . . .



*v. Louisiana*, 428 U.S. 325, 334-35, 96 S.Ct. 3001, 3006-07, 49 L.Ed.2d 974 (1976), was decided the year before his trial. *See Reed v. Ross*, —— U.S. ——, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984).

In any event, the argument that Florida's system is unconstitutional because in some cases lesser degrees of the charged crime are instructed without factual support is without merit. At the time this case was tried, there was a difference in the treatment of lesser degrees of a charged crime and lesser included offense. Florida law has always prohibited instructions on lesser-included offenses unless the lesser-included offense is necessarily included in the charged offense or there is evidence to support a conviction on the lesser-included offense. *Gilford v. State*, 313 So.2d 729, 732-33 (Fla.1975); *Brown v. State*, 206 So.2d 377, 384 (Fla.1968); *see* Fla.Stat. § 919.14 (1969) (replaced by Fla.R.Crim.P. 3.490, Fla. Rules of Court). If the defense requested, however, the court at that time had to instruct on all lesser degrees of a charged offense whether or not the evidence supported those lesser degrees. *Gilford*, 313 So.2d at 733. This was true even though "[i]n many cases the elements of the lesser degrees are totally distinct from the offense charged." *Brown*, 206 So.2d at 381. In 1981, the Florida Supreme Court amended the procedural rule which mandated this result. *In re Florida Rules of Criminal Procedure*, 403 So.2d 979 (Fla.1981). The rule now requires that the trial court charge only on those lesser degrees supported by the evidence. Fla.R.Crim.P. 3.490.

Although Florida's former practice of charging on all lesser degrees may have introduced some "distortion into the factfinding process" by allowing for jury pardon, *see Spaziano v. Florida*, —— U.S. ——, ——, 104 S.Ct. 3154, 3160, 82 L.Ed.2d 340 (1984); *Hopper v. Evans*, 456 U.S. 605, 611, 102 S.Ct. 2049, 2052, 72 L.Ed.2d 367 (1982), no Eighth Amendment problem was created. Florida juries were not faced with a choice of convicting on a

lesser offense not supported by the evidence in order to avoid imposing the death penalty. It was this combination of a mandatory death sentence for murder and the required charging on lesser offenses that the Supreme Court condemned in *Roberts v. Louisiana*, 428 U.S. at 334-35, 96 S.Ct. at 3006-07, as leading to arbitrary results violative of the Eighth Amendment.

Third, petitioner's claim that the death penalty is applied in a racially discriminatory manner in Florida depends on the same statistical study rejected by this Court in *Sullivan v. Wainwright*, 721 F.2d 316, 317 (11th Cir.), *aff'd*, —— U.S. ——, 104 S.Ct. 450, 78 L.Ed.2d 210 (1983); *see Spinkellink v. Wainwright*, 578 F.2d 582, 612-616 (5th Cir.1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979). The Supreme Court has held this argument to be without merit. *Wainwright v. Ford*, —— U.S. ——, 104 S.Ct. 3498, —— L.Ed.2d —— (1984); *see Sullivan v. Wainwright*, —— U.S. ——, ——-—— & n.3, 104 S.Ct. 450, 451-52 & n.3, 78 L.Ed.2d 210, 212-13 & n.3.

*Brown Issue*

Petitioner raises the so-called *Brown* issue decided in *Ford v. Strickland*, 696 F.2d 804 (11th Cir.) (en banc), *cert. denied*, —— U.S. ——, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983), and suggests we reconsider our decision based on an argument mentioned in a concurring opinion in *Ford*. The *Brown* issue involved a claim by 123 death row inmates, including petitioner, that the Florida Supreme Court had examined nonrecord information during its appellate review of their sentences. This Court, sitting *en banc*, held that no constitutional violation had occurred. *Ford v. Strickland*, 696 F.2d at 811. This panel is bound by that decision.

AFFIRMED.



JOHNSON, Circuit Judge, dissenting:

I dissent from the majority's disposition of this case on two issues: (1) petitioner's claim that he was denied an individualized sentencing hearing as required by the Eighth and Fourteenth Amendments to the Constitution and recognized in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and (2) petitioner's claim that the trial court's imposition of the death sentence after his rejection of a proffered guilty plea by the court violated his rights as guaranteed by the Eighth Amendment and the Fourteenth Amendment's Due Process Clause. Since I would hold that petitioner has clearly stated a claim on which relief may be granted on both of these grounds and that proof of these claims depends in part on facts outside the record before us, I would remand this case to the district court for an evidentiary hearing as to both claims. *Blackledge v. Allison*, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977).

Petitioner's sentencing hearing was held on February 4, 1977. At that time, the post-*Furman* 1972 Florida capital sentencing statute governing the sentencer's consideration of mitigating factors, Fla.Stat.Ann. § 921.141(2) and (6), had been interpreted in *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), and *Cooper v. State*, 336 So.2d 1133 (Fla.1976). In *Proffitt v. Florida*, the Supreme Court in considering the constitutionality of Florida's capital sentencing scheme as a whole noted that, unlike the statute's limitation of the sentencer's consideration of aggravating factors to those listed in the statute, "[t]here is no such limiting language introducing the list of statutory mitigating factors." 428 U.S. at 250 n.8, 96 S.Ct. at 2965 n.8. Or, as the Court later stated in *Lockett v. Ohio*:

> In *Proffitt v. Florida*, six Members of this Court assumed, in approving the statute, that the range of mitigating factors listed in the statute was not exclusive. . . . None of the statutes we sustained in

*Gregg* [428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859] and the companion cases clearly operated at that time to prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor.

438 U.S. at 606, 607, 98 S.Ct. at 2965, 2966. Six days after the decision in *Proffitt v. Florida*, *Cooper v. State* was decided by the Florida Supreme Court. In *Cooper*, the Florida Supreme Court apparently held, in language quoted in full below,[1] that Section 921.141 did limit the

[1] We held in *State v. Dixon* [283 So.2d 1 (Fla. 1973)] that the rules of evidence are to be relaxed in the sentencing hearing, but that evidence bearing no relevance to the issues was to be excluded. *The sole issue in a sentencing hearing under Section 921.141, Florida Statutes (1975), is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have no place in that proceeding any more than purely speculative matters calculated to influence a sentence through emotional appeal.* Such evidence threatens the proceeding with the undisciplined discretion condemned in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).[7]

As to proffered testimony concerning Cooper's prior employment, it is argued that this evidence would tend to show that Cooper was not beyond rehabilitation. Obviously, an ability to perform gainful work is generally a prerequisite to the reformation of a criminal life, but an equally valid fact of life is that employment is not a guarantee that one will be law abiding. Cooper has shown that by his conduct here. *In any event, the Legislature chose to list the mitigating circumstances which it judged to be reliable for determining the appropriateness of a death penalty for "the most aggravated and unmitigated of serious crimes," and we are not free to expand the list.*

[7] The legislative intent to avoid condemned arbitrariness pervades the statute. Section 921.141(2) requires the jury to render its advisory sentence "upon the following matters: (a) Whether sufficient aggravating circumstances exist *as enumerated in subsection (6)*; (b) Whether sufficient mitigating circumstances exist *as enumerated in subsection (7)*, which outweigh the aggravating circumstances found to exist . . . ." (emphasis added). This limitation



sentencer's consideration of mitigating factors to those listed in the statute. Later cases binding on this Court have so interpreted *Cooper*. *Ford v. Strickland*, 696 F.2d 804, 812 (11th Cir.1983) (en banc) ("Ford contends he cannot be faulted for failing to raise the issue . . . because Florida Supreme Court decisions decided prior to trial indicated only statutory mitigating circumstances could be considered. The court ruled explicitly to this effect two years after trial in *Cooper v. State*. . . . *Lockett v. Ohio*, . . . a direct reversal of this view, was not decided until two years later . . ."); *Foster v. Strickland*, 707 F.2d 1339, 1346 (11th Cir.1983); *Proffitt v. Wainwright*, 685 F.2d 1227, 1238 and n.18 (11th Cir. 1982). *Cooper* was the controlling decision of Florida law in effect at the time of petitioner's sentencing trial.

Two years after the decision in *Cooper* and one year after petitioner's sentencing trial, *Lockett v. Ohio*, *supra*, was decided. In *Lockett*, the Supreme Court held that the limitation of a sentencer's consideration to an exclusive statutory list of mitigating factors violated the Eighth and Fourteenth Amendments. Two months later, in *Songer v. State*, 365 So.2d 696 (Fla.1978) (on rehearing), the Florida Supreme Court rejected a *Lockett* challenge to the statute based on *Cooper*. The court found that the *Cooper* language concerning the exclusivity of statutory mitigating factors was dicta and that "*Cooper* is not apropos to the problems addressed in *Lockett*." *Id.* at 700. The court held that its construction of Section 921.141(6) since enactment had been that "all relevant circumstances may be considered in mitigation, and that the factors listed in the statute merely indicate the principal factors to be considered." *Id.*

is repeated in Section 921.141(3), governing the trial court's decision on the penalty. Both sections 921.141(6) and 921.141(7) begin with words of mandatory limitation. This may appear to be narrowly harsh, but under *Furman undisciplined* discretion is abhorrent whether operating for or against the death penalty.

336 So.2d at 1139 (emphasis added) (footnotes omitted).

In light of this history, I agree with the majority that at the time of petitioner's sentencing trial, after *Cooper* but before the clarification in *Songer*, the statute was, at best, ambiguous: capable of both a constitutional construction in accordance with *Lockett* as not limiting the sentencer's consideration to statutory mitigating factors, as in *Proffitt v. Florida*, and an unconstitutional construction that the statutory list of mitigating factors was exclusive, as in *Cooper*. *See Proffitt v. Wainwright*, *supra*, at 1238 and nn. 18, 19. Stated differently, as the petitioner argues, at the time of his sentencing trial, the statute was unconstitutional due to its ambiguity.[2]

As with all but certain First Amendment attacks based on a statute's ambiguity, however, petitioner must also demonstrate that the unconstitutional interpretation of the statute was actually followed at his sentencing trial; that, in short, the statute was unconstitutional as applied to him. To meet this element of stating a claim on which relief may be granted, petitioner alleges that the unconstitutional *Cooper* interpretation of the statute affected his sentencing proceedings because his counsel reasonably relied on *Cooper* as the controlling statement of Florida law in his preparation and presentation at the sentencing trial. Unlike the majority, I cannot conclude based on this record that petitioner's allegations in support of his claim "conclusively show that the [petitioner

[2] The majority misreads the *Cooper/Lockett* claims made by the petitioner. As both the briefs and the oral argument make clear, petitioner first claims that due to its ambiguity the statute was unconstitutional as applied to him and further that the unconstitutional interpretation of the statute deprived him of effective assistance of counsel by operation of state law. Petitioner then argues only in the alternative that if it was clear that the statute permitted the introduction of nonstatutory mitigating factors, his counsel was ineffective in failing to investigate and present such evidence. I address only the first of petitioner's claims, that the statute was unconstitutional as applied to him, and do not, as does the majority, read petitioner's argument simply as an ineffective assistance of counsel claim.



is] entitled to no relief," or that these allegations are so "palpably incredible . . . so patently frivolous or false" that summary dismissal is warranted. *Blackledge v. Allison*, *supra*, 431 U.S., at 73, 76, 97 S.Ct. at 1628, 1630. To the contrary, the lack of any evidentiary hearing in the state or district courts to develop a record by which we can evaluate this claim and the proffer of evidence supporting this claim by the petitioner in the district court demonstrate that the petitioner is entitled to an evidentiary hearing on the issue of whether the unconstitutional construction of the statute actually affected the course of his sentencing proceeding.

In support of his motion for an evidentiary hearing in the district court, petitioner alleged that his trial counsel, Tabscott, would testify that at the time he represented petitioner at the sentencing trial he believed that *Cooper* limited the sentencer's consideration to statutory mitigating factors and that Tabscott would testify that he "focused upon the statutory mitigating circumstances in his pre-trial investigation and preparation as well as in his presentation of evidence and argument at trial." Petitioner proffered an affidavit by Tabscott in support of these allegations. In this affidavit, Tabscott states that "during my representation of Mr. Hitchcock, my perception was that the consideration of mitigating circumstances was limited to the factors enumerated in the statute."

Petitioner further alleged, and proffered evidence in support of his allegations, that significant evidence of nonstatutory mitigating factors could have been presented at his sentencing hearing "had Mr. Tabscott believed that the law permitted the presentation of such evidence." Petitioner proffered the testimony and report of a psychologist who had examined him as establishing the nonstatutory mitigating factors that his behavior in committing the crime was inconsistent with his established patterns of behavior and that he had great potential for rehabilita-

tion.[3] Petitioner also proffered testimony and affidavits of various family members attesting his difficult childhood and his good character.

The record of petitioner's sentencing hearing does not contradict the affidavit of petitioner's counsel that he believed only statutory mitigating factors could be presented at his hearing. Nor does the record reveal that substantial nonstatutory mitigating evidence was in fact presented. Only one witness, the petitioner's brother, testified at the sentencing hearing as to circumstances that could arguably be identified as nonstatutory mitigating factors: the petitioner's father had died of cancer, petitioner's mother worked on a farm, and the witness had allowed petitioner to babysit his children. Further testimony from this witness that petitioner's habit of "sucking on" automotive gasoline seemed to affect him mentally was argued by counsel as a statutory psychological mitigating factor. The bulk of the argument by petitioner's counsel was an evaluation of whether the statutory mitigating factors did or did not apply in this case. Petitioner's counsel reminded the sentencing jury of earlier testimony concerning petitioner's background, but he did not argue this testimony as a mitigating factor, asking only that the jury consider it "for whatever purposes you may deem appropriate." In short, the slender evidence from the state sentencing hearing record that some mitigating factors not listed in the statute were, to a limited extent, before the sentencing jury does not conclusively establish that petitioner's counsel in fact believed that such evidence could be, and was, presented and fully argued to the jury as nonstatutory mitigating factors.

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[3] Contrary to the majority's suggestion, this evidence, although produced through a psychologist's evaluation does not also fall, within the statutory mitigating factor that "the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance." Fla. Stat. Ann. § 921.141 (4) (b).



Nor does the precedent of this Court indicate that petitioner's proffer was insufficient to entitle him to an evidentiary hearing. *Proffitt v. Wainwright*, *supra*, rejected a claim of ineffective assistance of counsel based on an attorney's affidavit that he had relied on an interpretation of Florida law that precluded the presentation of nonstatutory mitigating factors:

> [T]he defense attorney's belief that he could not, under the Florida statute, introduce evidence of mitigating factors not listed in Fla. Stat. § 921.141(6) was entirely reasonable. His decision not to call witnesses at the penalty stage to testify about appellant's general character and background was therefore justifiable and fully within the sixth amendment standard of reasonably effective assistance.

685 F.2d at 1248. The petitioner in this case, unlike the petitioner in *Proffitt*, challenges the Florida statute as applied to him. As a necessary step in his argument that the statute was ambiguous and that the unconstitutional interpretation of the statute governed his sentencing hearing through his attorney's reliance on *Cooper*, petitioner claims that his attorney reasonably relied on *Cooper*. *Proffitt*, then, in fact supports petitioner's attack on the statute. In *Ford v. Strickland*, *supra*, this Court held that the jury instructions given at the defendant's sentencing hearing did not result in the jury's perceiving that it was limited only to the consideration of statutory mitigating factors because both the trial court and counsel did not so perceive the law. In *Foster v. Strickland*, *supra*, the Court held that no prejudice had been shown from the defendant's failure to object to similar jury instructions because the defendant did not proffer any nonstatutory mitigating evidence to support his claim. Neither *Ford* nor *Foster* speaks to the present case in which the petitioner has proffered both evidence that his counsel perceived Florida law to limit the presentation of mitigating evidence to those factors listed in the stat-

ute and evidence that substantial nonstatutory mitigating evidence was available.

In sum, I would hold the evidence proffered by the petitioner to the district court sufficient to entitle him to an evidentiary hearing on his allegations that, but for his counsel's reasonable reliance on the Florida Supreme Court's interpretation of the statute as precluding the introduction of nonstatutory mitigating evidence, such evidence would have been investigated and presented at his sentencing hearing. Although the inference is clear from the affidavit and petitioner's allegations, I recognize that the proffered affidavit does not explicitly state this causal relationship between counsel's reliance on *Cooper* and the course of his sentencing hearing. This does not, however, as the majority seems to assume, require a summary dismissal of petitioner's claims, but rather it is in both law and logic further demonstration of the need for an evidentiary hearing in this case. We cannot conclusively determine from the evidence before us whether petitioner's allegations of this causal relationship are indeed fact. If, as petitioner alleges, his counsel's reliance on *Cooper* as limiting the sentencer's consideration to statutory mitigating factors precluded counsel from investigating or presenting available evidence of nonstatutory mitigating factors, then petitioner has demonstrated that the unconstitutional interpretation of the ambiguous statute did affect his sentencing hearing, and relief should be granted.

I would further hold that petitioner has stated a claim of constitutional deprivation through his allegations that, prior to trial, the trial court approved of the prosecution's offer of a plea agreement of life imprisonment, and thus the trial court at least implicitly agreed to impose life imprisonment as a sentence if petitioner were to accept this offer, and after trial the court sentenced petitioner to death without making written findings as to why before trial a life sentence was proper and after trial the death sentence was imposed.



*Bordenkircher v. Hayes*, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978), relied on by both the majority and the district court, does not apply to the present case. *Bordenkircher* involved the limited factual situation where a state prosecutor carried out a threat to reindict the defendant on a more serious charge if the defendant did not plead guilty. *Bordenkircher* did not involve either the court's participation in the plea bargaining process or the possible sentence of the death penalty. Both of these factors, present in this case, distinguish the proper analysis from that in *Bordenkircher* and demonstrate that petitioner has stated a claim of constitutional deprivation.

In *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), the Supreme Court held that a state court could not impose a greater sentence on a defendant after retrial following a successful appeal unless "the reasons for [its] doing so . . . affirmatively appear [in the record]." *Id.* at 726, 89 S.Ct. at 2081. In the absence of such record evidence, the chilling effect of an inference that the defendant was being punished for exercising his constitutionally protected right to appeal or collaterally attack his conviction was held to violate the Fourteenth Amendment's Due Process Clause.

Relying on the equally protected constitutional right to trial by jury, and the equally recognized principle that the "Constitution forbids the exaction of a penalty for a defendant's unsuccessful choice to stand trial," due to the chilling effect on the exercise of this right, *Smith v. Wainwright*, 664 F.2d 1194, 1196 (11th Cir. 1981), the Ninth Circuit has held in noncapital cases that:

> [O]nce it appears in the record that the court has taken a hand in plea bargaining, that a tentative sentence has been discussed, and that a harsher sentence has followed a breakdown in negotiations, the record must show that no improper weight was given the failure to plead guilty. In such a case, the record must affirmatively show that the court sentenced the

> defendant solely upon the facts of his case and his personal history, and not as punishment for his refusal to plead guilty.

*United States v. Stockwell*, 472 F.2d 1186, 1187-88 (9th Cir. 1973).

Moreover, the Supreme Court has expressly recognized that the Eighth Amendment's heightened due process reliability requirement in capital cases applies with equal force to permissible plea bargaining practices. In *United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968), the Supreme Court invalidated the procedures of the Federal Kidnapping Act under which a defendant would receive a life sentence if he pleaded guilty but could receive a death sentence if he chose to stand trial. In *Corbitt v. New Jersey*, 439 U.S. 212, 99 S.Ct. 492, 58 L.Ed.2d 466 (1978), the Supreme Court approved the practice of extending leniency for a guilty plea in noncapital cases, but expressly noted that "the death penalty, which is 'unique in its severity and irrevocability,' is not involved here." *Id.* at 217, 99 S.Ct. at 496 (quoting *Gregg v. Georgia*, 428 U.S. 153, 187, 96 S.Ct. 2909, 2931, 49 L.Ed.2d 859 (1976)). Justice Stewart, the author of *Bordenkircher*, concurred in the result in *Corbitt* on the grounds that *Jackson* did not apply because the death penalty was not involved and *Bordenkircher* did not apply because it simply involved the prosecutor's acting within the adversary system and not a state statute as in *Corbitt*. 439 U.S. 226-28, 99 S.Ct. 501-02.

Finally, the Supreme Court has recognized the unique power of the death penalty to coerce guilty pleas and thus chill the exercise of the constitutionally protected right to trial by jury. In *Jackson*, the Court stated that, because "assertion of the right to jury trial may cost [a defendant] his life," the Federal Kidnapping Act impaired the exercise of this right. 390 U.S. at 572, 88 S.Ct. at 1211. The evil in the statute was "not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them." *Id.* at 583, 88 S.Ct. at 1217.



In light of this precedent, it is clear the Eighth Amendment's requirement that a "decision to impose the death sentence be, and appear to be, based on reason," *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977), is not met by a system in which the trial court tenders a life sentence as part of a plea bargain before trial and then imposes the death sentence without explanation after the defendant has exercised his right to stand trial. The inference that the defendant is being punished by the ultimate sanction for exercising his constitutionally protected right to trial is, without record evidence to the contrary, unacceptable. I would therefore hold that petitioner's allegations state a claim under the Eighth Amendment and the Fourteenth Amendment's Due Process Clause.

A transcript of the plea conference at which the alleged offer to accept a life sentence in return for a guilty plea was either tendered to defendant and his counsel or approved by the trial court is not a part of the record now before this Court. No evidentiary hearing to determine the accuracy of petitioner's crucial allegation that the trial court in fact approved such an offer has been held in either the state courts or the district court. Instead, the sole evidence before this Court on this issue are remarks made at petitioner's sentencing hearing, *see* majority opinion, *supra*, at note 2, which are ambiguous at best and are insufficient to evaluate the accuracy of petitioner's claim. I therefore would hold that petitioner is entitled to an evidentiary hearing in the district court on this issue.[4]

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[4] The warden-appellee argues that the Florida Supreme Court on direct appeal made historical findings of fact on this issue entitled to the statutory presumption of correctness under 28 U.S.C.A. § 2254(d). On direct appeal, the Florida Supreme Court rejected the petitioner's claim that "the trial court offered him a sentence of

life imprisonment in return for a plea of nolo contendere as charged" and thus that the trial court imposed the death sentence because he exercised his right to a jury trial. 413 So.2d at 746. The Florida Supreme Court concluded:

> Hitchcock's version of the facts surrounding this point . . . is not supported. Rather, it appears from the record, as supplemented, that the judge agreed only to consider such an agreement if Hitchcock were to plead guilty. Because Hitchcock refused to consider a plea, the court never had to consider whether to accept the plea bargain. When defense counsel reminded the judge during sentencing proceedings of the plea negotiations, the judge responded, "there was never any understanding because your client didn't want to consider any plea."

*Id.*

Petitioner notes that the record before the Florida Supreme Court consisted solely of the remarks made during sentencing and was supplemented only by affidavits of both petitioner's counsel and the prosecutor. The affidavit of petitioner's counsel, executed contemporaneously with the trial proceedings, states: "Judge Paul indicated that he would accept a plea of nolo contendere as charged and that [petitioner] would be sentenced to life imprisonment." The prosecutor's affidavit is to the contrary: "Judge Paul indicated that he would consider [the State's] recommendation, *should* the . . . defendant actually plead guilty as charged." Petitioner also argued to the Florida Supreme Court that, should it find the record insufficient and the affidavits contradictory, it should remand to the state habeas court for an evidentiary hearing. Based on these facts, petitioner claims that the Florida Supreme Court's factfinding procedure * * *



ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, ANDERSON and CLARK, Circuit Judges.*

BY THE COURT:

A member of this court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in this court in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the cause shall be reheard by this court en banc *with* oral argument on a date hereafter to be fixed. The clerk will specify a briefing schedule for the filing of en banc briefs.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

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No. 83-3578

JAMES ERNEST HITCHCOCK, PETITIONER-APPELLANT

*v.*

LOUIE L. WAINWRIGHT, RESPONDENT-APPELLEE

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Aug. 28, 1985

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Appeal from the United States District Court
for the Middle District of Florida

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**OPINION**

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, ANDERSON and CLARK, Circuit Judges, and MORGAN, Senior Circuit Judge.*

RONEY, Circuit Judge:

This case was taken on rehearing *en banc* principally to consider two of several constitutional claims raised by petitioner James Ernest Hitchcock. He asserts (1) that at the time of his capital sentencing, Florida law unconstitutionally discouraged his attorney from investigating and presenting nonstatutory mitigating evidence, and (2) that the trial court improperly considered petitioner's refusal to plead guilty in imposing a death sentence. The district court denied all claims raised by Hitchcock without conducting an evidentiary hearing. We affirm.

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* Circuit Judge Joseph W. Hatchett, having recused himself, did not participate in this decision. Senior Circuit Judge Lewis R. Morgan elected to participate in this decision pursuant to 28 U.S.C. § 46(c).



In January 1977, Hitchcock was convicted and sentenced to death for the murder of his brother's thirteen-year-old stepdaughter. The Florida Supreme Court affirmed his conviction and sentence. *Hitchcock v. State*, 413 So.2d 741 (Fla.), *cert. denied*, 459 U.S. 960, 103 S.Ct. 960, 74 L.Ed.2d 213 (1982). The denial of Hitchcock's state post-conviction motion to vacate judgment and sentence was likewise affirmed. *Hitchcock v. State*, 432 So.2d 42 (Fla.1983). After his federal petition for habeas corpus was denied by the district court, Hitchcock raised five issues on appeal. The panel opinion, one judge dissenting on two issues, affirmed the denial of relief as to all issues. *Hitchcock v. Wainwright*, 745 F.2d 1332 (11th Cir.1984), *vacated for reh'g en banc*, 745 F.2d 1348 (11th Cir.1985).

With respect to his claims on sufficiency of the evidence, arbitrariness of the death penalty in Florida, and the *Brown* issue decided in *Ford v. Strickland*, 696 F.2d 804 (11th Cir.) (*en banc*), *cert. denied*, —— U.S. ——, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983), we now reinstate the sections of the panel opinion denying relief. Although closely following the panel discussion, we set forth fully in the opinion for the *en banc* court the reasons for rejecting Hitchcock's other two claims.

I. *Restriction of Mitigating Evidence*

The confusion in Florida law surrounding nonstatutory mitigating evidence in capital sentencing has been discussed at length in prior decisions of this Court. *Hitchcock v. Wainwright*, 745 F.2d 1332, 1335-37 (11th Cir. 1984); *Ford v. Strickland*, 696 F.2d 804, 813 (11th Cir. 1983) (*en banc*), *cert. denied*, —— U.S. ——, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983); *Proffitt v. Wainwright*, 685 F.2d 1227, 1238-39 (11th Cir.1982), *cert. denied*, ——

U.S. ——, 104 S.Ct. 508, 78 L.Ed.2d 697 (1983); *see also Songer v. Wainwright*, —— U.S.——, 105 S.Ct. 817, 819-22, 83 L.Ed.2d 809, 812-14 (1985) (Brennan, J., dissenting from denial of certiorari). In summary, for six years after the Florida death penalty statute was reenacted in 1972, there was some ambiguity as to whether a defendant had a right to introduce evidence in mitigation at a capital sentencing proceeding when the evidence fell outside the mitigating factors enumerated in the statute. The opinions cited above set forth the manner in which this uncertainty first arose in *State v. Dixon*, 283 So.2d 1 (Fla.1973), *cert. denied sub nom. Hunter v. Florida*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), and was exacerbated by *Cooper v. State*, 336 So.2d 1133 (Fla.1976), *cert. denied*, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977). The confusion was finally alleviated in *Songer v. State*, 365 So.2d 696 (Fla. 1978), *cert. denied*, 441 U.S. 956, 99 S.Ct 2185, 60 L.Ed. 2d 1060 (1979), after the United States Supreme Court had ruled in *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record."

A number of Florida prisoners sentenced to death before *Songer* was decided have since sought constitutional relief, claiming that the confusion in Florida law inhibited investigation, presentation, and consideration of nonstatutory mitigating evidence at their capital sentencing. The basic legal problems have been addressed in a variety of contexts: as a *Lockett* challenge to the facial constitutionality of the death penalty statute itself as interpreted in *Cooper* by the Florida Supreme Court, *see Spinkellink v. Wainwright*, 578 F.2d 582, 620-21 (5th Cir. 1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed. 2d 796 (1979); as a claim that counsel was ineffective in failing to investigate or present nonstatutory mitigating evidence, *see Proffitt v. Wainwright*, 685 F.2d 1227, 1248



(11th Cir.1982), *cert. denied*, —— U.S. ——, 104 S.Ct. 508, 78 L.Ed.2d 697 (1983) and *Songer v. Wainwright*, 571 F.Supp. 1384, 1393-97 (M.D. Fla.1983), *aff'd*, 733 F.2d 788, 791 n.2 (11th Cir.1984), *cert denied*, —— U.S. ——, 105 S.Ct. 817, 83 L.Ed.2d 809 (1985); as a challenge to jury instructions as restricting the scope of mitigating evidence to that enumerated in the statute, *see Ford v. Strickland*, 696 F.2d 804, 813 (11th Cir.) (*en banc*), *cert. denied*, —— U.S. ——, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983); *Foster v. Strickland*, 707 F.2d 1339, 1346-47 (11th Cir.1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 2375, 80 L.Ed.2d 847 (1984); and *Songer v. Wainwright*, 733 F.2d 788, 792 (11th Cir.1984); and as a claim arising under *Lockett v. Ohio* that Florida law as applied discouraged and prevented introduction of available nonstatutory mitigating evidence. *See Hitchcock v. Wainwright*, 745 F.2d 1332, 1335-37 (11th Cir.1984); *see also Songer v. Wainwright*, —— U.S. ——, 105 S.Ct. 817, 817, 83 L.Ed.2d 809, 810 (1985) (Brennan, J., dissenting from denial of certiorari).

To date, this Court has considered these claims on a case-by-case basis, evaluating the impact of Florida law on each individual petitioner's capital sentencing hearing. We now reaffirm that approach. The *en banc* Court has determined that an analysis should be made in each case presented to evaluate a petitioner's claim on the particular facts of the case. A court should consider the status of Florida's law on the date of sentencing, the record of the trial and sentencing, the jury instructions requested and given, post-trial affidavits or testimony of trial counsel and other witnesses, and proffers of nonstatutory mitigating evidence claimed to have been available at the time of sentencing. In some cases, full and fair consideration of the claim will necessitate an evidentiary hearing. Although generally an evidentiary hearing on the issue is preferable, in some cases, such as the one before us, the record will be sufficient to support a decision in the absence of an evidentiary hearing.

In the instant case, the district court dismissed this claim on the grounds that Florida law did not limit what evidence could be produced in mitigation at the penalty stage and that the record indicated petitioner's attorney did not think he was constrained by the statute.

The evidence proffered to the district court does not establish the right to constitutional relief. Although there was a proffer of evidence that the trial attorney may have been mistaken about Florida law, the record belies the argument that at the time of the case, the presentation to the jury would have been appreciably different had it not been for the possible confusion of petitioner's attorney as to the law on mitigating circumstances.

Petitioner submitted an affidavit of the attorney, a public defender, who represented him at trial and sentencing. The affidavit of the attorney is carefully written. It states that although the attorney does not have an independent recollection, he is of the opinion, upon reviewing the transcript, that during his representation of petitioner his perception was that consideration of mitigating circumstances was limited to the factors enumerated by the statute. It says he is aware of the current status of the case and that evidence of relevant mitigating circumstances was not investigated or presented in petitioner's sentencing trial. The affidavit does not indicate, however, that he would have done anything differently at that time.

At the sentencing hearing, petitioner's attorney called petitioner's brother, James, who testified about petitioner at the age of five or six, about his father's death, about the farm work of both the mother and the father hoeing and picking cotton in Arkansas, that there were seven children in the family, and that he left "Ernie" to babysit with the brother's small children. Other testimony relating to petitioner's character had come out at trial. Petitioner testified he left home when he was thirteen because he could not tolerate seeing his stepfather abuse his mother. His mother testified that he was a good child and he minded her. Three of his siblings told the jury he



was not a violent person. During closing argument the attorney referred to much of the evidence not fitting squarely within the confines of the statutory mitigating circumstances including the difficult circumstances of petitioner's upbringing, the possibility of rehabilitation, and that petitioner voluntarily turned himself in. Finally, he admonished the jury to "look at the overall picture. You are to consider everything together . . . consider the whole picture, the whole ball of wax."

Petitioner has suggested several different pieces of evidence of nonstatutory mitigating circumstances which might have been presented. First, he argues that testimony by psychologists could have been introduced which would have corroborated lingering doubts about guilt and shown petitioner was an excellent candidate for rehabilitation. Such testimony would tend to establish his innocence, he says, by bringing out that he had coped with stressful situations throughout his life by retreating or escaping. There is no indication in this record, however, that the attorney at the time of sentencing would have followed this course even if he had known he could. Such matters are not judged from hindsight. *Strickland v. Washington*, 466 U.S. 668, ——, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674, 694 (1984). It should be noted that mental and emotional conditions are statutorily permitted mitigating considerations. Fla.Stat.Ann. § 921.141 (6)(b). Petitioner has cited us no cases holding that the mere failure to investigate or produce psychological or psychiatric evidence renders a sentencing proceeding unconstitutional.

Petitioner argues that greater details as to his upbringing in an environment of extreme poverty, his solid character traits, devotion to hard work, willingness to contribute to the family's support, and respect for adults should have been presented as evidence of nonstatutory mitigating factors. All of this was developed, however, to some extent for the jury. As described above, elements of petitioner's character and other background in-

formation were testified to by petitioner's brother, sisters, and mother as well as by petitioner himself. Petitioner's trial counsel reminded the jury of these facts during closing argument in the penalty phase.

It thus appears that petitioner was not denied an individualized sentencing hearing.

### II. *Life Sentence Offered for Guilty Plea—Death Sentence Imposed After Conviction.*

Petitioner asserts that the state trial judge imposed the death sentence as punishment for petitioner's decision to go to trial rather than plead guilty. Petitioner alleged that the prosecutor and the judge together offered him a plea bargain which would exchange his plea of guilty for a life sentence. Petitioner declined the offer. After trial, the judge on the jury's recommendation sentenced petitioner to death. Petitioner argues his death sentence must be overturned because the trial judge's sentencing order did not explain why death became an appropriate penalty after trial.

The record is unclear as to whether the trial judge indicated he would approve a life sentence on guilty plea, or merely would consider it. We treat the case as if the defendant would have received a life sentence on a guilty plea.

Although the principle of law that petitioner argues would apply on retrial and resentencing after a successful appeal, *North Carolina v. Pearce*, 395 U.S. 711, 726, 89 S.Ct. 2072, 2081, 23 L.Ed.2d 656 (1969); *Blackledge v. Perry*, 417 U.S. 21, 28-29, 94 S.Ct. 2098, 2102-03, 40 L.Ed.2d 628 (1974), it does not apply to the failure of a plea bargain. *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S.Ct. 663, 667, 54 L.Ed.2d 604 (1978). In the "give-and-take" of plea bargaining, the state may extend leniency to a defendant who pleads guilty foregoing his right to jury trial. *Brady v. United States*, 397 U.S. 742, 753, 90 S.Ct. 1463, 1471, 25 L.Ed.2d 747 (1970). Legislative schemes which extend the possibility of leniency to defendants who plead guilty are permissible so long as the statute does not unnecessarily burden the assertion of constitutional rights or act to coerce inaccurate guilty pleas. *Compare United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968) (statute invalid when defendant could only receive death sentence if he went to trial) *with Corbitt v. New Jersey*, 439 U.S. 212, 99 S.Ct. 492, 58 L.Ed.2d 466 (1978) (statute valid when plea of *non vult* gave possibility of sentence of not more than 30 years but conviction at trial carried mandatory life sentence). A judge, as much as the prosecutor and the legislature, should not be precluded from approving leniency in sentencing upon an admission of guilt. *Cf. Corbitt*, 439 U.S. at 224 n. 14, 99 S.Ct. at 500 n. 14 (cannot permit prosecutor to offer leniency but not legislature).



In criminal cases generally, sentencing after conviction following a failed plea bargain presents a different situation from sentencing on retrial after a reversal of a prior conviction or sentence. Upon a second conviction after a prior conviction has been set aside, a defendant stands in the same posture for sentencing as he did after his first conviction. Presumably the facts before the court for determination of the correct sentence would be the same in both instances. Unless the court cites circumstances which occurred after his original sentence, a greater sentence would appear to be for no reason other than a penalty for the defendant's challenging of his conviction. *See Wasman v. United States*, —— U.S. ——, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984).

A defendant who pleads guilty, however, is in a markedly different posture from a defendant who is convicted at trial. Only after trial and a sentencing hearing has the trial court learned all of the facts which might be considered for sentencing. On a plea bargain, the defendant's and prosecutor's agreement forecloses the necessity for such a detailed explanation.

Moreover, by pleading guilty a defendant confers a substantial benefit to the objectives of the criminal justice system:

> the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof.

*Brady v. United States*, 397 U.S. at 752, 90 S.Ct. at 1471. The state is entitled to extend a sentence of less than that which might otherwise be appropriate to a defendant that confers such a benefit on it. 397 U.S. at 753, 90 S.Ct. at 1471. The heart of a plea bargain, from a defendant's point of view, is the opinion of avoiding a possibly harsher sentence after conviction at trial.

Absent a demonstration by the defendant of judicial vindictiveness or punitive action, a defendant may not complain simply because he received a heavier sentence after trial. *Blackmon v. Wainwright*, 608 F.2d 183 (5th Cir.1979), *cert. denied*, 449 U.S. 852, 101 S.Ct. 143, 66 L.Ed.2d 64 (1980). We have held that a mere allegation of discrepancy between a defendant's actual sentence and that which he would have received had he foregone trial to plead guilty does not invalidate the sentence. *Smith v. Wainwright*, 664 F.2d 1194, 1197 (11th Cir.1981).

In capital cases particularly, there is no merit to the argument that the sentencing judge should have set forth the reasons why the sentence after trial was greater than what would have been approved on a guilty plea. The precise reasons for a death sentence are required by Florida statute to be set forth by the sentencing judge. The possibility of a different sentence because the defendant pleads guilty does not run afoul of the requirement that the "decision to impose the death sentence be, and appear to be, based on reason." *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). In this case, the court imposed the death penalty only after fully considering the aggravating and mitigating circumstances and receiving the jury's recommendation of death. The procedure in Florida fully meets the Ninth Circuit's requirements that if a court participates in plea bargaining "the record must show that the court sentenced the defendant solely upon the facts of his personal history, and not as punishment for his refusal to plead guilty." *United States v. Stockwell*, 472 F.2d 1186, 1187-88 (9th Cir.), *cert. denied*, 411 U.S. 948, 93 S.Ct. 1924, 36 L.Ed.2d 409 (1973).



A trial court which approved a sentence based on a plea bargain prior to trial need not, upon rejection of that offer and conviction at trial, restrict its sentence to that offered for the plea bargain, set forth reasons for harsher sentence, nor impose such sentence only for conduct occurring after the aborted plea bargaining.

The district court properly denied Hitchcock's petition for habeas corpus.

AFFIRMED.

JOHNSON, Circuit Judge, dissenting, joined by CLARK, Circuit Judge, and joined as to Part I by GODBOLD, Chief Judge, KRAVITCH and R. LANIER ANDERSON, III, Circuit Judges:

The district court denied habeas corpus relief to James Ernest Hitchcock without conducting an evidentiary hearing. The failure to conduct such a hearing should determine the outcome in this case, for two of the allegations of error raised by the petitioner are legally sufficient to require a grant of relief and the only real question is the truth of his factual allegations. We cannot at this point determine whether Hitchcock was convicted and sentenced in accordance with the Constitution, and

should therefore remand the case for fact-finding by the district court. Accordingly, I dissent.

I. *Cooper/Lockett* claim

The petitioner in this case contends that Florida law at the time of his sentencing hearing was most reasonably interpreted to restrict the presentation of mitigating evidence in violation of *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.E.2d 973 (1978), and that the interpretation of state law operated in his case to prevent him from presenting some mitigating evidence to the jury. The first half of this argument is virtually beyond dispute, while the second half can be properly evaluated only after an evidentiary hearing.

A. State law at the time of Hitchcock's trial

As the majority concedes, a progression of events from the enactment of the post-*Furman* * Florida death penalty statute in 1972 to the time of his sentencing trial in 1977 created the possibility that state law would restrict improperly the types of mitigating evidence that could be presented. Whether such restrictions actually affected any particular sentencing hearing during this time must be determined on the facts of each case, and Hitchcock's claim must be viewed in light of the fact that at the time of his sentencing trial in 1977 the confusion regarding state law was at its very height. *Cf. Songer v. Wainwright*, 769 F.2d 1488 (11th Cir.1985).

Defense counsel, prosecutor and trial judge were all interpreting the statute in light of erroneous or misleading language in the statute itself, *compare* FLA.STAT. 921.141(2), (3) (describing task of jury and sentencing judge as balancing of aggravating circumstances against mitigating circumstances "as enumerated" in statute)

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* *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).



*with* FLA.STAT. 921.141(5), (6) (aggravating circumstances "shall be limited" to eight categories, while mitigating circumstances "shall be" those contained in listed categories), and decisions of the Florida Supreme Court, including *State v. Dixon*, 283 So.2d 1, 7 (Fla.1973) (statute creates "a system whereby the possible aggravating and mitigating circumstances are defined"), and *Cooper v. State*, 336 So.2d 1133, 1139 (Fla.1976) (upholding trial court's decision to exclude evidence on relevance grounds because proffered evidence bore no relevance to issue involved at sentencing proceeding; sole issue in capital sentencing "is to examine in each case the *itemized* aggravating and mitigating circumstances. Evidence concerning other matters have [sic] no place in that proceeding.") (Emphasis supplied). *See id.* at 1139 n. 7. The relevant law at this time has been described in greater detail elsewhere, *see Songer v. Wainwright*, —— U.S. ——, 105 S.Ct. 817, 819-22, 83 L.Ed.2d 809, 812-14 (1985) (Brennan, J., dissenting from denial of certiorari). Here it will suffice to note that the erroneous or confusing signals regarding mitigating evidence that were operating in this case were more plentiful than at any time before or since.

The confusion affected cases tried during this time other than this one. In *Songer v. State*, 365 So.2d 696 (Fla.1978), *cert. denied*, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979), the court cited several cases in which it had affirmed sentences imposed after trial courts had allowed non-statutory mitigating circumstances into evidence. While it is possible to question the accuracy of each of the seven citations since they arguably involved statutory rather than non-statutory mitigating circumstances, Hitchcock does not claim that all Florida courts followed an unconstitutional interpretation of state law. Rather, he claims that the improperly restrictive view was possible under state law and was followed in a number of cases, including his own. Several

facts tend to support his contention. First, none of the seven cases explicitly state in holding or dicta that a trial court may consider mitigating evidence outside the statute. Second, during the time that defendants in some cases were perhaps proffering non-statutory evidence, the Florida Supreme Court appeared to reaffirm in other cases the restrictive interpretation of *Cooper*. For instance, in *Gibson v. State*, 351 So.2d 948, 951-52 (Fla. 1977), the court found no mitigating circumstances present at all and simply recited the lower court's findings concerning the absence of statutory mitigation. *See also Perry v. State*, 395 So.2d 170, 174 (Fla.1981) (in trial before *Songer*, trial judge relied on *Cooper* and precluded evidence of non-statutory factors).

The possibility of an unconstitutionally restrictive application of the statute has been recognized by almost every federal appellate decision mentioning the issue. *Spaziano v. Florida*, —— U.S. ——, 104 S.Ct. 3154, 3158 n. 4, 82 L.Ed.2d 340 (1984) (Florida statute in effect in 1976 required consideration of only statutory mitigating factors); *Songer v. Wainwright*, 769 F.2d 1488 at 1489 (11th Cir.1985); *Foster v. Strickland*, 707 F.2d 1339, 1346 (11th Cir. 1983) (*Cooper* in direct conflict with *Lockett*); *Ford v. Strickland*, 696 F.2d 804, 812 (11th Cir.), *cert. denied*, —— U.S. ——, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983) (same); *Proffitt v. Wainwright*, 685 F.2d 1227, 1238 & nn. 18-19, 1248 (11th Cir.1982), *cert. denied*, —— U.S. ——, 104 S.Ct. 508, 78 L.Ed.2d 697 (1983) (Florida law in flux, reasonable to interpret as limiting mitigating evidence to statutory categories); *but see Spinkellink v. Wainwright*, 578 F.2d 582, 620-21 (5th Cir.1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979) (statute on its face does not improperly restrict use of mitigating circumstances). Thus, Hitchcock has successfully proven the first half of his argument, to wit, Florida law in February 1977 was highly susceptible to an interpretation that violated *Lockett v. Ohio*.



B. Effect of Florida law in Hitchcock's case

The petition for habeas corpus in this case forthrightly states that Hitchcock's trial counsel, Tabscott, believed that Florida law prohibited him from introducing mitigating evidence falling outside the confines of the statutory list. It also alleges that this understanding of state law directly caused him to pass over critical pieces of mitigating evidence.

The district court summarily dismissed the petition under Rule 4 of the Rules Governing Section 2254 Cases, without an evidentiary hearing. Under *Blackledge v. Allison*, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977), summary dismissal is proper only under limited circumstances. The majority in this case has necessarily concluded, therefore, that proof of the claim does not depend upon facts outside the record or that the allegations in the petition are "palpably incredible" or "patently frivolous or false." *Id.* at 76, 97 S.Ct. at 1630.[1] None of those conditions are present in this case.

The best factual support for the factual allegations in the petition appears in the affidavit of Tabscott stating that at the time of trial he believed that non-statutory mitigating factors were inadmissible. The majority correctly notes that this affidavit leaves many unanswered questions regarding Tabscott's understanding of state law at the time of sentencing and the effect that state law had on his conduct of the defense. No court has made findings of fact regarding Tabscott's understanding of state law. The existing record does not reveal whether and how Tabscott acted on his alleged beliefs regarding the restrictions of state law and there has been no evidentiary hearing regarding this matter, although the Florida Supreme Court stated in Hitchcock's direct appeal

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[1] *Blackledge* also provides for summary dismissal when the petitioner has stated no claim upon which relief can be granted. The majority does not hold that Hitchcock's claim is insufficient as a matter of law.

that the trial judge had not erroneously limited the types of mitigating evidence presented to the jury because "the defense itself chose to limit that presentation." 413 So.2d at 748. The extent to which the affidavit falls short of proving the allegations of the petition only underscores the necessity for an evidentiary hearing.

The truth of Hitchcock's claim is also supported, but not established, by the existence of several pieces of evidence that could have been investigated and introduced at his trial if his attorney had not held a restrictive view of the statute. He describes extensive testimony that he could have elicited from family members and a law enforcement officer regarding the difficult circumstances of his childhood and his good prospects for rehabilitation. He also proffered before the district court the testimony of a psychologist who had examined Hitchcock. His testimony related to the lingering possibility of Hitchcock's innocence (attacking the victim in a time of stress would have been an uncharacteristic response for Hitchcock) and to the possibility of rehabilitation.[2]

On the other hand, Hitchcock did present at the sentencing trial the testimony of his brother. The primary purpose of the testimony was to substantiate the existence of a statutory mitigating circumstance: substantial impairment of his ability to appreciate the criminality of his actions. To this end, the brother testified that Hitchcock had "sucked gas" as a child and that as a result his mind "wandered." The brother also related to the jury in

[2] The majority makes reference to the statutory mitigating circumstance involving mental and emotional conditions. These do not permit the inference, however, that state law could not have limited the presentation of available evidence. First, much of the available but unpresented evidence had no connection with mental and emotional conditions. Second, the testimony of the psychologist would not fit under any of the statutory mitigating circumstances, for they refer to an "extreme mental or emotional disturbance" and to "substantial" impairment of the capacity to appreciate the criminality of one's conduct or to conform conduct to the requirements of law. FLA.STAT. § 921.141(6)(b), (f).



brief fashion (two transcript pages) that Hitchcock had grown up on a farm, that his father had died of cancer, and that he had served as babysitter for several family members. These facts were not statutory mitigating evidence; yet Tabscott elicited the testimony only as background to the brother's testimony regarding the statutory factor, and did not stress it in closing argument or characterize it as a mitigating factor that could enter into the jury's formal balancing process. He stated that the jury should consider the background information "for whatever purposes you may deem appropriate." Tabscott also referred in passing to the evidence of Hitchcock's character presented earlier during the guilt-innocence trial. At the close of his argument, he made the statement that the jury should consider "everything together," although it is far from clear whether he meant by this statement that the jury should consider all statutory and non-statutory mitigating evidence or simply that they should weigh in whatever way they saw fit the mitigating evidence that the law permitted them to consider.

The preceding overview of the evidence presented at sentencing confirms that some evidence not strictly related to statutory mitigating factors was placed before the jury. The question is whether this renders "palpably incredible" or "patently false" Hitchcock's allegation that state law restricted the presentation of mitigating evidence. The only reasonable conclusion is that it does not.

The opinion in *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978), states that the sentencer must be able to hear *any* mitigating evidence relating to the defendant's character or record or the circumstances of the offense, not just *some* evidence outside the bounds of a statutory catalogue. It should not matter whether the restriction of mitigating evidence is a complete failure to mention the evidence or the failure to develop it fully and incorporate it into the defense. The issue to be resolved in an evidentiary hearing would be causation rather than the type of restriction involved:

Did state law really cause counsel to restrict the presentation of mitigating evidence?

A lawyer might believe that state law prohibits the use of non-statutory mitigating evidence and could still introduce some evidence of that type and make passing reference to it in the belief that it would not provoke an objection so long as the reference is brief and unimportant. Similarly, a lawyer may feel free to mention evidence during closing argument that was adduced during the guilt-innocence trial, in the belief that the restrictions of state law apply primarily to the introduction of evidence at sentencing and do not place such stringent limits on closing arguments. Each of these explanations is consistent with the record and with each of the allegations of the petition; none of them are palpably incredible or patently false.

The majority's willingness to assume no causal link between Tabscott's interpretation of state law and his presentation of the defense stands in marked contrast to the court's recent decision in *Songer v. Wainwright*, 769 F.2d 1488 at 1489 (11th Cir.1985). In that case the court was confronted with evidence that a trial judge had believed that state law prohibited him from considering non-statutory mitigating evidence as he reached a decision regarding the appropriate sentence. The en banc court granted habeas corpus relief despite the lack of conclusive evidence regarding a causal link between the judge's beliefs and the sentence imposed, for it was not clear just what mitigating evidence the trial court had refused to consider as a result of his statutory interpretation. *Songer* should demonstrate that once a petitioner establishes that a restrictive interpretation of state law could have limited the type of mitigating evidence presented to or considered by the sentencer, incomplete evidence of a causal link between the operation of state law and the mitigating evidence actually considered or presented will not defeat the claim. Hitchcock is entitled to



an evidentiary hearing at least as clearly as Songer deserved habeas corpus relief.

In sum, the truth of the factual allegations in the petition remains an open question that should be answered in an evidentiary hearing. Hence it is not proper to deny habeas corpus relief on this claim at this stage of the proceedings.

## II. Plea Negotiations

During a pretrial conference, the state court judge allegedly told Hitchcock's lawyer that he would impose a life sentence if the defendant pleaded nolo contendere, an offer that Hitchcock refused. No transcript of this conference was ever made but Hitchcock's attorney executed a contemporaneous affidavit documenting the refused offer. Hitchcock claims that the death sentence was imposed upon him as punishment for his decision to reject this plea offer by the trial court. The death sentence, he argues, was an improper burden on his right to a jury trial.

In order to decide whether there is a need for further factfinding, it is necessary to determine (1) whether, assuming Hitchcock's allegations are true, he has stated a claim upon which relief can be granted, (2) whether the state court's factual findings on this matter are sufficient and correct.

### A. Sufficiency of claim

The majority assumes that the facts were just as Hitchcock alleged: the trial court and the prosecutor offered in conference before trial to accept from Hitchcock a plea of nolo contendere in exchange for a life sentence, an offer which Hitchcock refused. The same trial court imposed the death sentence on Hitchcock without stating on the record the reasons for increasing the punishment from life imprisonment. The majority then holds that these facts are insufficient to state a basis for relief.

Normally the initiation and breakdown of plea negotiations would not prevent the court from imposing a sentence heavier than the one originally offered. Under *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978), a prosecutor may in the give-and-take of plea bargaining make an offer and then later seek a more severe punishment. But this was no ordinary breakdown in bargaining, for two reasons. First, the court became involved in the negotiations; second, the sentence imposed was death.

The fact that the court itself offered the life sentence to Hitchcock makes this case similar to *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), which held that a state court could not impose a greater sentence on a defendant after retrial following a successful appeal unless the reasons for doing so affirmatively appeared on the record. Any other result would imply that a defendant was being punished for exercising the constitutional right to appeal or to attack collaterally a conviction.

The involvement of the trial court was important to the finding of a due process violation in *Pearce*: "It is unfair to use the great power given to the court to determine sentence to place a defendant in the dilemma of making an unfree choice." 395 U.S. at 724, 89 S.Ct. at 2080 (quoting *Worcester v. Commissioner*, 370 F.2d 713, 718 (1st Cir.1966). While *Pearce* did involve sentencing at retrial rather than a first trial, the right to stand trial in the first instance is no less fundamental than the right to appeal that was involved in *Pearce*, and the mechanism for burdening the defendant's right carries the same appearance of impropriety whenever the court brings its coercive power to bear in negotiations. Indeed, the Ninth Circuit has found the analogy between the two situations persuasive enough to construct a general constitutional rule against judicial involvement in plea negotiations: "Once it appears on the record that the court has taken a hand in plea bargaining, that a tentative sentence has been discussed, and that a harsher sentence has followed a breakdown in negotiations, the record must show that no improper weight was given the failure to plead guilty." *United States v. Stockwell*, 472 F.2d 1186 (9th Cir.), *cert. denied*, 411 U.S. 948, 93 S.Ct. 1924, 36 L.Ed.2d 409 (1973).



Such an application of *Pearce* might not be constitutionally mandated; it is certainly unnecessary here. Disclosure of reasons for enhanced sentences in all cases of judicial involvement in plea negotiations might not be constitutionally required because, as the majority points out, vindictiveness is more likely to motivate harsher sentences after appeal and retrial than after rejection of a plea bargain: in the latter case, the proof at trial is available to explain the enhanced sentence.[3] Yet Hitchcock's case does not call for a constitutional rule applying to all judicial involvement in plea negotiations. The fact of judicial involvement in plea negotiations is joined in this case by the fact that the enhanced sentence is the sentence of death.

The majority's attempt to address the problem of judicial involvement in the plea bargaining process completely ignores the peculiarly coercive impact of a threatened death penalty. It is true, as the majority states, that prosecutors may participate in plea bargaining, *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970), and legislators may within certain limits create statutes that reward defendants for foregoing trial, *Corbitt v. New Jersey*, 439 U.S. 212, 99 S.Ct. 492, 58 L.Ed.2d 466 (1978). Yet legislatures are restricted in their use of the death penalty to induce guilty pleas. For instance, in *United States v. Jackson*, 390

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[3] On the other hand, Supreme Court precedent certainly does not foreclose the *Stockwell* rule. *Bordenkircher* involved negotiations between a prosecutor and a defendant, parties of roughly equal strength, whereas the participation of the court is more markedly coercive to the defendant. The due process clause should come into play in cases posing the greatest risk of coercion, including those cases where judicial involvement is greatest.

U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968), the Court invalidated the procedures of the Federal Kidnapping Act under which a defendant would receive a life sentence if he plead guilty but could receive a death sentence if he chose trial. The Court stated that where the assertion of the right to a jury trial could cost a defendant his life, the statute "needlessly encourages" guilty pleas. And in *Corbitt v. New Jersey*, 439 U.S. 212, 217, 99 S.Ct. 492, 496, 58 L.Ed.2d 466 (1978), the Court approved a statute extending leniency in return for a guilty plea in non-capital cases, but noted that "the death penalty, which is unique in its severity and irrevocability" was not involved. The same limits applicable to legislative use of the death penalty threat as an incentive to defendants should apply with equal force to judges.

Moreover, the unusually coercive power of the threat of a death sentence is heightened further when the threat comes directly from the judge, who plays a critical and sometimes decisive role in the capital sentencing process. Judges are not limited in their power to punish a defendant for insisting on the right to trial by weighing that fact in determining the sentence as prosecutors and legislators are. Prosecutors do not have the power themselves to determine sentence, and the legislature must pass general legislation without singling out particular defendants. The particularly sensitive and coercive role of the judge in the defendant's decision to plead guilty has been often noted in the context of Fed.R.Crim.P. 11. *See United States v. Adams*, 634 F.2d 830 (5th Cir. 1981). The majority's equation of legislators, prosecutors and judges does not account for the uniquely coercive power held by judges.

Assuming, then, that the judge in this case did offer a reduced risk of receiving the death penalty in order to induce a plea of guilty, this case involves the confluence of two coercive factors that have been limited by the Constitution in other contexts. It would be most in keeping with the due process limitations set forth in *Pearce*, *Jackson*, and *Corbitt* to restrict the participation of courts in plea-bargaining in capital cases. Whether those restrictions took the form of an absolute prohibition or a requirement that the reasons for the imposition of the death sentence despite the earlier offer of life appear on the record, Hitchcock would have stated a claim.



B. State court factfinding

Before the trial judge sentenced Hitchcock, his attorney made a statement to the court on his behalf. At one point during the remarks, the attorney referred to the court's involvement in an earlier plea negotiation:

> MR. TABSCOTT: I would also remind the Court that prior to trial, the Court did agree to a plea of nolo contendere giving the defendant a life sentence upon that plea. I have nothing further.
>
> THE COURT: I think the record ought to show that the matters we discussed, there was never any understanding, because your client didn't want to consider any plea.
>
> MR. TABSCOTT: That plea was offered to him by the State and the Court, however. And, it is true he declined to enter that plea.

This is the entire factual record before this court relating to Hitchcock's claim. When this claim was pressed before the Florida Supreme Court, the record also contained an affidavit completed by Tabscott at the time of the plea offer, stating that "Judge Paul indicated that he would accept a plea of nolo contendere as charged and that the Appellant would be sentenced to life imprisonment." The prosecutor completed an affidavit three years after the sentencing that contradicted Tabscott's version: "Judge Paul indicated that he would consider [the State's] recommendation, should the . . . defendant actually plead guilty as charged."

The Florida Supreme Court ultimately rejected Hitchcock's claim by making a factual finding. It stated that

"the judge agreed only to consider such an agreement if Hitchcock were to plead guilty . . . . There is nothing in the record even hinting that the trial court imposed the death penalty because Hitchcock chose to have a jury trial." 413 So.2d at 746.

The warden now contends that this is a factual finding entitled to the presumption of correctness of 28 U.S.C.A. § 2254(d). Of course, the statement that "the judge agreed only to consider such an agreement if Hitchcock were to plead guilty" can only be construed as finding of historical fact, not a legal conclusion. But the Florida Supreme Court reached its findings by reviewing conflicting affidavits and ambiguous statements in the trial transcript. It did not remand for an evidentiary hearing despite the availability of the affiants. Moreover, the finding reached by the court relied exclusively on the affidavit completed years after the event and ignored the affidavit created at the time of the plea offer. The court also made a logical jump from the trial court's statement that "there was no understanding" to the conclusion that the trial court never had to "consider" the offer. The trial court's statement could also have meant that it considered an offer and extended the offer, which was then rejected by the defendant.

Under these circumstances, the Florida Supreme Court cannot be said to have reached its findings of fact after a full and fair hearing, 28 U.S.C.A. § 2254(d)(2), and the finding was not supported by the record as a whole, 28 U.S.C.A. § 2254(d)(8). Thus, the statutory presumption of correctness does not apply. The district court should be ordered to hold an evidentiary hearing to resolve the conflict in the existing record and determine whether the trial court attempted to induce Hitchcock to plead guilty by threatening him with an increased chance of receiving the death penalty if he went to trial. I therefore dissent from the majority's holding that denies relief to Hitchcock before the facts relevant to his adequate legal claim have been developed.



UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

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No. 83-3578

JAMES ERNEST HITCHCOCK, PETITIONER-APPELLANT

*v.*

LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections, RESPONDENT-APPELLEE

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Nov. 19, 1985

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**ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC**

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, ANDERSON and CLARK, Circuit Judges, and MORGAN, Senior Circuit Judge.*

PER CURIAM:

This case was heard *en banc*. *Hitchcock v. Wainwright*, 770 F.2d 1514 (11th Cir.1985).

A petition for rehearing has been filed seeking rehearing of that decision. When the *en banc* court has decided a case, and rehearing of that decision is sought, the petition will be treated as a F.R.A.P. Rule 40 Petition for

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* Circuit Judge Joseph W. Hatchett, having recused himself, did not participate in this decision. Senior Circuit Judge Lewis R. Morgan elected to participate in this decision, pursuant to 28 U.S.C.A. § 46(c).

Rehearing, addressed to all judges who sat on the *en banc* court. The standards for granting rehearing under Rule 40 will be applied in consideration of the petition.

Once the case is taken *en banc*, the petition for rehearing need not meet the standards required for the granting of rehearing *en banc* under F.R.A.P. Rule 35. A senior judge who sat with the *en banc* court on the decision of the case, pursuant to 28 U.S.C.A. § 46(c), shall participate in the consideration of such petition.

The petition for rehearing in this case is DENIED.

GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, HENDERSON, ANDERSON and CLARK, Circuit Judges, and MORGAN, Senior Circuit Judge concur in this opinion.

JOHNSON, Circuit Judge, dissenting, in which KRAVITCH, Circuit Judge joins:

Petitioner has asked for a rehearing *en banc* of the decision of the *en banc* court. The majority holds that this petition for rehearing will be treated as a F.R.A.P. Rule 40 Petition for Rehearing. In consequence, the petition does not have to meet the standards required for the granting of rehearing *en banc* under F.R.A.P. Rule 35, and consideration of the petition is not limited to judges in regular active service. This action allows a senior circuit judge, who participated in the *en banc* decision, to also participate in the consideration of the petition for rehearing *en banc*.

F.R.A.P. Rule 40, which specifies the procedures to be followed in petitioning for rehearing, says that the petition "shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended. . . ." The focus of the petition for rehearing is thus to enable the court to correct its mistakes. The petition is addressed to the three-judge panel which has decided the case. This Circuit does not limit consideration of such petitions to judges in regular active service.



In contrast, F.R.A.P. Rule 35 states that rehearings of the court of appeals *en banc* are "not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." Participation in the decision of whether to rehear a case *en banc* is limited to those "circuit judges who are in regular active service." F.R.A.P. Rule 35.

The Supreme Court has held that, although a senior circuit judge who participated in the original panel that decided a case can participate in the *en banc* rehearing of that case, no senior circuit judge can participate in any decision of whether or not to grant an *en banc* rehearing of a case. *Moody v. Albemarle Paper Co.*, 417 U.S. 622, 94 S.Ct. 2513, 41 L.Ed.2d 358 (1974). The basis of the Court's decision was that Congress has explicitly vested the power to decide whether to rehear a case *en banc* in the "circuit judges of the circuit who are in regular active service." *Id.* at 627, 94 S.Ct. at 2516. The Court held that Congress appeared to have contemplated that the decision to rehear a case *en banc* "is essentially a policy decision of judicial administration" that requires the "intimate and current working knowledge" of the circuit possessed by judges in regular active service. *Id.* at 626-27, 94 S.Ct. at 2516.

The rationale for enabling senior circuit judges to participate in the decision of whether to grant a rehearing *en banc* in a case just decided by the *en banc* court is that such a rehearing would be simply to correct mistakes; the policy decision to rehear the case *en banc* would already have been made. Whether or not this rationale is sound, it conflicts with Congress' express prohibition on senior circuit judges participating in the decision to rehear a case *en banc*. *Id.* at 626-27, 94 S.Ct. at 2516-17; F.R.A.P. Rule 35. By its plain language,

this prohibition covers the decision of whether to hear "an appeal or other proceeding" before the *en banc* court. F.R.A.P. Rule 35. Since an *en banc* decision falls within the meaning of "an appeal or other proceeding," the decision of whether to rehear an *en banc* decision before the *en banc* court has been expressly limited to judges in regular active service.

I respectfully dissent.



SUPREME COURT OF THE UNITED STATES

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No. 85-6756

JAMES ERNEST HITCHCOCK, PETITIONER

*v.*

LOUIE L. WAINWRIGHT,
Secretary, Florida Department of Corrections

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Questions I, II and IV presented by the petition.

June 9, 1986